FILED
01-593 OCT 5 2001
OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11, affords "foreign states" various substantive and procedural protections in suits in American courts. The Act defines the term "foreign state" to include certain foreign corporations "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision." 28 U.S.C. § 1603(b)(2). In this case, the State of Israel controlled more than 65% of the shares in two Israeli corporations through ownership of their ultimate parents. Contrary to at least four other circuits (including the Fifth in a case involving the same Israeli corporations), the Ninth Circuit refused to treat the corporations as foreign states under the Act because Israel did not directly own their shares. As a consequence, this case presents the following question:

> Whether a corporation in which a foreign sovereign controls a majority of the shares indirectly through ownership of the corporation's ultimate parent may qualify as a "foreign state" under the Foreign Sovereign Immunities Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In the proceedings below, the plaintiffs-appellants were respondents Gerardo Dennis Patrickson, Rodolfo Bermudez Arias, Benigno Torres Hernandez, Fernando Jiminez Arias, Santos Leandros, Herman Romero Aguilar, Elias Espinoza Merelo, Hooker Era Celestino, Alirio Manuel Mendez, and Carlos Humberto Rivera.

The defendants-appellees were petitioners Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. (incorrectly sued below as Fresh Del Monte, N.V.).

The third-party defendants/cross-appellants were Dead Sea Bromine Co., Ltd., and Bromine Compounds Limited.

Petitioner Dole Food Company, Inc. has no parent corporations. Although it has issued stock to the public, no publicly held company owns 10% or more of its stock. Petitioners Dole Fresh Fruit Company, Dole Fresh Fruit International, Ltd., Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., and Standard Fruit Company de Honduras, S.A. are, either directly or indirectly, wholly owned subsidiaries of Dole Food Company, Inc.

Petitioner AMVAC Chemical Corporation is owned by American Vanguard Corporation, which has issued stock to the public. No publicly held company other than American Vanguard Corporation owns more that 10% of AMVAC Chemical Corporation's stock.

Petitioner Maritrop Trading Corporation is a wholly owned subsidiary of petitioner Chiquita Brands, Inc., which is, in turn, a wholly owned subsidiary of petitioner Chiquita Brands International, Inc. Chiquita Brands International, Inc. has issued stock to the public. American Financial Group, Inc. and its subsidiaries, own more than 10% of the stock of Chiquita Brands International, Inc. American Financial Group, Inc., which has no parent corporations, and its subsidiary Great American Financial Resources, Inc., have issued stock to the public.

Petitioners Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. are, either directly or indirectly, wholly owned subsidiaries of Fresh Del Monte Produce Inc., which has issued stock to the public. No publicly held company owns more than 10% of the stock of Fresh Del Monte Produce Inc.

Petitioner The Dow Chemical Company, which has no parent corporations, has issued stock to the public, and no publicly held company owns 10% or more of its stock.

Petitioner Occidental Chemical Corporation is wholly owned by its parent companies, which are Oxy CH Corporation, Oxy Chemical Corporation, Occidental Chemical Holding Corporation, Occidental Petroleum Investment Company, and Occidental Petroleum Corporation. Occidental Petroleum Corporation has issued stock to the public.

Petitioner Pineapple Growers Association of Hawaii is a not-for-profit corporation, has no parent corporations, and has not issued stock to the public.

Petitioner Shell Oil Company is indirectly, wholly owned by Royal Dutch Petroleum Company, a Netherlands corporation, and by The "Shell" Transport and Trading Company, p.l.c., a British corporation, both of which have issued shares to the public. No publicly held company owns 10% or more of the stock in either Royal Dutch Petroleum or The "Shell" Transport and Trading Company, p.l.c.

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PETITION FOR A WRIT OF CERTIORARI

Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 251 F.3d 795. The opinion of the district court (App. 24a-78a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on May 30, 2001. A petition for rehearing en banc was denied on July 10, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(a) of the Foreign Sovereign Immunities Act, provides in pertinent part:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a) & (b). The Foreign Sovereign Immunities Act, as amended, is reprinted in its entirety in the appendix. App.108a -125a.

STATEMENT

This case presents an important and recurring question concerning the scope of the Foreign Sovereign Immunities Act (the "FSIA" or the "Act"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11. The FSIA provides "foreign states" with general immunity from suit and a variety of procedural protections, including the right to remove cases to federal court. *See, e.g.*, 28 U.S.C. §§ 1441(d), 1604. The term "foreign state" is defined by the Act to include, among other things, certain foreign corporations "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision." *Id.* § 1603(b)(2). In the decision below, the Ninth Circuit held that this definition covers only corporations that are directly owned by foreign governments or their political subdivisions. The other circuits to consider the question — including the Fifth Circuit in a case involving the corporations at issue here — disagree and hold that the FSIA applies to indirectly owned corporations as well.

The FSIA

Before the enactment of the FSIA in 1976, American law did "not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity." H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. For example, although this Court had long adhered to the "separate entity rule" under which companies owned by a sovereign engaging in commercial affairs do not enjoy immunity "so far as concerns the transactions of [those] compan[ies]," *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824) (Marshall, C.J.), there was little consistency among the lower courts in the treatment of foreign state-owned companies. *See, e.g.*, William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 545-47 (1991). Recognizing that "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences," H.R. Rep. No. 94-1487, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611, Congress enacted the FSIA to set forth uniform rules for the treatment of foreign governments and their affiliates.

In keeping with prior development of the doctrine of sovereign immunity, the FSIA makes foreign states generally immune from suit in both state and federal courts, but recognizes a number of exceptions to that immunity. *See* 28 U.S.C. §§ 1604-05. For example, as under the separate entity rule, there is no immunity under the FSIA from claims based on "commercial activity carried on in the United States." *Id.* § 1605(a)(2); *see also id.* § 1603(d) (defining commercial activities). Even in the absence of immunity, the Act affords foreign states important procedural protections, including prohibitions on punitive damages, attachment and execution, and jury trials. *See id.* §§ 1330(a), 1441(d), 1606, 1609-11. Of particular relevance here, the FSIA also gives foreign states

a broad right to remove suits from state to federal court. *See id.*§ 1441(d); *see also* H.R. Rep. No. 94-1487, at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6631 (noting the importance of removal "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

Although these protections are limited to "foreign states," under the FSIA that term extends beyond foreign governments. In fact, the Act defines the term "foreign state" to include "a political subdivision of a foreign state" as well as "an agency or instrumentality" of such a state. 28 U.S.C. § 1603(a). An agency or instrumentality is in turn defined to include foreign corporations "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2); *see also id.* § 1603(b)(1) (requiring that the corporation be "a separate legal person, corporate or otherwise"); *id.* § 1603(b)(3) (requiring that the corporation be neither a citizen of the United States nor created under the laws of a third country). This latter definition is not designed to dictate how entities owned by a foreign government should be structured. To the contrary, as Congress implicitly recognized, under this definition a state-owned or -controlled entity "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, [or] a steel company" and still qualify as a "foreign state" under the FSIA. H.R. Rep. No. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

DBCP and the Prior Litigation over Its Use

This suit is "one front in a broad litigation war" between plaintiffs' lawyers representing banana farm workers from foreign countries such as Costa Rica, Ecuador, Guatemala, and Panama on the one hand and major fruit growers and chemical manufacturers on the other hand over the use of the chemical dibromochloropropane (DBCP) in those countries.

App. 4a. Accordingly, in understanding this case, it is helpful to know something about DBCP and the long history of litigation over it.

DBCP — DBCP is a pesticide that was used from the late 1960s through the 1970s on farms in the United States and abroad to control nematodes (microscopic, worm-like creatures that live in soil and attack the roots of trees and plants) and to improve crop yields. After studies appeared in the 1970s linking DBCP exposure to health risks such as cancer and sterility, its use was discontinued. App. 4a.

The Initial Suits — In 1983, what has been described as "one of the most wideranging efforts at forum shopping in legal history" began. *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 837 (S.D. Fla. 1987), *aff'd in relevant part*, 883 F.2d 1553 (11th Cir. 1989). In that year, dozens of Costa Rican agricultural workers sued Dow Chemical Company and Shell Oil Company in state court in Florida alleging injuries from exposure to DBCP manufactured by those companies. After removal to federal court based upon diversity of citizenship, the case was dismissed under the doctrine of *forum non conveniens*. *See Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985) (per curiam). In affirming, the Eleventh Circuit described the suit as a "paradigm case for the invocation of the doctrine of *forum non conveniens*." *Id.* at 1217-18.

Undaunted, foreign plaintiffs and their coterie of lawyers continued to file DBCP suits throughout the United States. In the last two decades, they have tried their luck in state courts in California, Texas, Florida, Louisiana, Mississippi, and, in this case, Hawaii. Although several of these suits were settled either in part or in whole, the vast majority were, upon removal to federal court, either voluntarily dismissed or

dismissed by the court based upon the *forum non conveniens* doctrine.[1]

The Alfaro Decision — One DBCP case that did not ultimately turn on the *forum non conveniens* doctrine was an action filed in Texas in 1984 by Costa Rican farm workers. Although the trial court and the court of appeals dismissed the case based on the *forum non conveniens* doctrine, in 1990 a sharply divided Texas Supreme Court held that a state statute had abrogated the doctrine in Texas. *See Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990). The Texas legislature subsequently remedied this ruling by reinstating the doctrine, *see* 1993 Tex. Sess. Law Serv. ch. 4 (S.B. 2) § 1 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 71.051(a)), but that legislation did not become effective until September 1, 1993. *See id.* § 2.

Dead Sea and the Delgado Cases — The opening left by the effective date of the Texas legislation set off a mad scramble to file DBCP suits in Texas state courts. Just prior to the statutory deadline, thousands of plaintiffs alleging injuries suffered in nearly two dozen different countries filed suit in Texas state courts against a number of banana growers and DBCP manufacturers. *See Delgado v. Shell Oil Co.*, 231 F.3d 165, 169-72 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001).

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[1] *See, e.g., Espinola-E v. Coahoma Chem. Co.*, No. 98-60240, slip op. at 8-9 (5th Cir. Jan. 19, 2001), *cert. denied sub nom. Aroyo-Gonzalez v. Coahoma Chem. Co.*, No. 00-1814, 2001 WL 649101 (U.S. Oct. 1, 2001); Notice, *Abarca-Abarca v. CNK Disposition Corp.*, No. 95 1096 (M.D. Fla. July 12, 1995) (voluntary dismissal); *Rojas v. DeMent*, 137 F.R.D. 30 (S.D. Fla. 1991), *vacated on other grounds*, No. 91-8185, slip op. (S.D. Fla. Feb. 25, 1992); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990); *Cabalceta*, 667 F. Supp. at 837; *Aguilar v. Dow Chem. Co.*, No. 86-4753, slip op. at 12-16 (C.D. Cal. Dec. 23, 1986).

Dead Sea Bromine Co., Ltd., and Bromine Compounds, Limited (collectively, "the Dead Sea Companies") are, respectively, the largest producer of bromine in the world and a leader in the production and marketing of bromine compounds. *See* About DSBG, *available at* http://www.deadseabromine.com. Although these companies also produced DBCP, and there was "evidence of the use of Israeli DBCP" in various of the countries at issue in the *Delgado* case, *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1343 & n.35 (S.D. Tex. 1995) [hereinafter *Delgado II*], they were not sued in the Texas cases. Accordingly, the defendants impleaded the Dead Sea Companies. *See Delgado*, 231 F.3d at 169.

Unlike the DBCP manufacturers that the plaintiffs sued, the Dead Sea Companies were state-owned. The bromine and other minerals that they extract from the Dead Sea and formulate into chemical compounds are one of Israel's most valuable natural resources. SER 738. Not surprisingly, although they were privatized in the 1990s, both companies were originally owned and controlled by the State of Israel through state holding companies. Thus, during the period in which the Dead Sea Companies exported DBCP for use on banana farms, the State of Israel controlled a majority of their shares through such holding companies. SER 740, 741, 754-55.

As foreign corporations majority-owned by a foreign government, the Dead Sea Companies exercised their rights under the FSIA to remove the Texas lawsuits to federal court, where they were consolidated. *See Delgado*, 231 F.3d at 169, 172. Contending that only corporations directly owned by a foreign sovereign can qualify as "foreign states" under the FSIA, the *Delgado* plaintiffs moved to remand. The district court disagreed and held that the Dead Sea Companies were foreign states under the FSIA because Israel owned, albeit indirectly, a majority of their stock at the relevant times. *See*

Delgado v. Shell Oil Co., 890 F. Supp. 1315, 1319 (S.D. Tex. 1995) [hereinafter *Delgado I*]. Finding that the balance of interests clearly weighed in favor of trial in plaintiffs' home countries, the court then dismissed the cases under the *forum non conveniens* doctrine. *See Delgado II*, 890 F. Supp. at 1372-73; *see also Delgado*, 231 F.3d at 173-74 (noting that several cases were eventually remanded for procedural defects before being removed and dismissed again).

On appeal, the Fifth Circuit affirmed. The court rejected the claim that the Dead Sea Companies had been improperly joined. *See Delgado*, 231 F.3d at 177-81. Even more pertinently, "discern[ing] nothing to support the proposition that indirect ownership of the requisite percentage precludes an entity from qualifying as a foreign sovereign," the court of appeals held that the Dead Sea Companies were foreign states under the FSIA. *Id.* at 175.

The Trial Court Proceedings in this Case

In 1997, while the *Delgado* appeal was pending in the Fifth Circuit, respondents filed this case in state court in Hawaii. This case is very similar to *Delgado*. Like many of the plaintiffs in *Delgado*, respondents are residents of Costa Rica, Ecuador, Guatemala, and Panama. They likewise allege that they were injured as a result of exposure to DBCP on banana farms in their home countries and have sued basically the same growers and manufacturers. Indeed, their counsel of record below represented intervenors in *Delgado*. *See Delgado II*, 890 F. Supp. at 1333.

As in *Delgado*, the defendants impleaded the Dead Sea Companies, and the Companies removed to federal court as "foreign states" under the FSIA. App. 5a. Dole Food Company and its subsidiaries also removed on the separate ground that respondents' claims called for application of the federal common law of foreign relations. App. 5a.

When respondents moved to remand, they argued, among other things, that the Dead Sea Companies were not foreign states because the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), requires direct majority ownership. Petitioners responded that *Gates* was distinguishable because the party at issue in that case was the subsidiary of a marketing board that was not owned by the Canadian Government, but instead by an organ of the Province of Alberta. *See id.* at 1459-61. As a consequence, petitioners argued, the Ninth Circuit had no occasion in *Gates* to consider whether a corporation can qualify as a foreign state based upon a foreign government's indirect ownership of it. Although the district court acknowledged that *Gates* was "not entirely on point," it nonetheless found itself compelled by Ninth Circuit precedent to require direct ownership and therefore held that the Dead Sea Companies were not foreign states under the FSIA. App. 34a-39a.

Nevertheless, the district court denied the motion to remand because it found that respondents' claims implicated the federal common law of foreign relations. App. 49a. The district court then entered an order conditionally dismissing on *forum non conveniens* grounds. App. 77a-78a; *see also* App. 79a-83a (denying motion to reconsider order); App. 84a-95a (entering judgment); App. 99a-107a (denying reconsideration of final dismissal order). When petitioners appealed, the Dead Sea Companies cross-appealed the district court's FSIA ruling.

The *Delgado* Petition

While the appeal in this case was pending, the *Delgado* plaintiffs petitioned this Court for a writ of certiorari. They primarily argued that the Fifth Circuit's decision in that case conflicted with the Ninth Circuit's in *Gates*. *See* Petition for a Writ of Certiorari, *Delgado v. Shell Oil Co.*, No. 00-1316, at 10-14 (U.S. Feb. 14, 2001). Although the defendants in *Delgado* did not dispute the importance of the question presented in the petition, they pointed out that this case was

pending in the Ninth Circuit and that, if they prevailed on their argument that *Gates* was distinguishable, there would be no conflict between *Gates* and *Delgado*, and thus no need for review. *See* Opposition Brief of the Dole Defendants, *Delgado v. Shell Oil Co.*, No. 00-1316, at 12 (U.S. March 8, 2001). They also argued that the Fifth Circuit's decision was correct. *See id.* at 16-17. Finally, they pointed out that review should be denied because (i) any remand would greatly burden the state courts and (ii) a remand would effectively unwind foreign suits that have proceeded for years based on the *forum non conveniens* dismissal. *Id.* at 17-20. This court denied review on April 16, 2001. *See* 121 S. Ct. 1603.

The Ninth Circuit's Decision in this Case

On May 30, 2001, the Ninth Circuit issued its decision, reversing the judgment of the district court in this case. The court of appeals rejected the district court's application of the federal common law of foreign relations but agreed with its application of the FSIA. App. 16a, 23a.

Assuming without deciding that the FSIA applies to companies that are state-owned at the time of the events giving rise to litigation, the court of appeal determined that the Dead Sea Companies were not "foreign states" under its prior decision in *Gates*. App. 16a-23a. It observed that petitioners had argued "not implausibly, that federal courts should not care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation." App. 20a-21a. It also recognized that this interpretation was supported by the Fifth Circuit's decision in *Delgado* as well as decisions of the Sixth and Seventh Circuits. App. 20a (citing *Delgado*, 231 F.3d at 176; *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 941 (7th Cir. 1996); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988)). It found, however, that none of this mattered because, in its view, *Gates* prohibited the FSIA's definition of foreign state from

extending beyond "the first tier of ownership" to cover operating subsidiaries such as the Dead Sea Companies. App. 21a.

Although the court of appeals acknowledged that *Gates* itself "did not consider whether the indirect ownership of stock qualified as an 'other ownership interest' under section 1603(b)(2)," it declined petitioners' invitation to read "other ownership interest" to include indirect ownership interests such as the State of Israel's in the Dead Sea Companies. App. 20a. Instead, the court "read it simply to describe some other form of ownership not called shares of stock" on the theory that any other reading would "make the majority-shareholder requirement superfluous." App. 20a. The court also rejected petitioners' argument that *Gates* applied only to corporations owned through an intermediate "organ," as opposed to an intermediate corporation, on the ground that "we would more readily view an organ of a foreign state as an extension of the government than we would view a state-owned business." App. 20a. The court therefore held that the Dead Sea Companies were not foreign states entitled to the protections of the FSIA. App. 23a.

REASONS FOR GRANTING THE WRIT

The decision below reveals a square conflict among the courts of appeals over the application of the Foreign Sovereign Immunity Act to corporate subsidiaries indirectly owned and controlled by foreign governments. As the FSIA was enacted in order to ensure uniform treatment of those governments and their affiliates, the conflict over this important and recurring issue warrants review by this Court.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FOUR OTHER COURTS OF APPEALS.

As an ABA Working Group recently recognized, "[t]he position of the majority of courts is that corporations indirectly

owned by a foreign state through intermediary parent corporations fall within the FSIA." Working Group of the Int'l Litig. Comm. of the Am. Bar Ass'n, *Recommendations and Report on the U.S. Foreign Sovereign Immunities Act* 38 (2001) [hereinafter ABA Working Group]. By its own admission, App. 20a, in holding that the FSIA requires direct ownership, the decision below directly conflicts with the decisions of other courts of appeals over this issue.

The conflict between this case and the Fifth Circuit's decision in *Delgado*, 231 F.3d 165, is clear. Like this case, *Delgado* was a suit commenced in state court by foreign banana farm workers claiming injuries resulting from alleged exposure to DBCP. The *Delgado* plaintiffs sued essentially the same growers and manufacturers sued here, and, as here, those growers and manufacturers impleaded the Dead Sea Companies. *See id.* at 169-72. In *Delgado*, however, the Fifth Circuit held that the Dead Sea Companies were "foreign states" under the FSIA. Noting that the FSIA "simply requires 'ownership' by a foreign state" and "draws no distinction between direct and indirect ownership," that court reasoned that "indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state." *Id.* at 176. It therefore concluded that Dead Sea was a foreign state because "Israel *indirectly* owns a majority interest in Dead Sea." *Id.* at 175 (emphasis added).

The Sixth Circuit has similarly determined that a foreign government's indirect ownership of a majority interest in a corporation can satisfy the FSIA's definition of foreign state. In *Gould*, 853 F.2d 445, two French copper companies were sued for, among other things, unfair competition and misappropriation of trade secrets. The first of these companies, Pechiney Ugine Kuhlmann, was wholly owned by the French Government. *Id.* at 449. The second, Trefimetaux, was wholly owned by the first at the time of the events giving rise to the lawsuit. *Id.* at 448. Even though the

French government's ownership interest in Trefimetaux was indirect, in contrast to the decision below, the Sixth Circuit held that the corporation was a foreign state under the FSIA and remanded for further consideration of whether the commercial activities exception permitted the claims against it in that case to proceed. *See id.* at 446-50.

The Seventh Circuit has also held corporate subsidiaries indirectly owned by foreign governments to be foreign states under the FSIA. In *Roselawn*, 96 F.3d 932, the court of appeals considered an airplane manufacturer, Avions de Transport Regional, G.I.E. ("ATR") that was jointly owned by two aerospace companies. A holding company wholly owned by the Italian government had a 62% interest in one of these companies. The other was owned by the French government, 62% directly and another 30% indirectly through other corporations. *Id.* at 935-36. Noting that the FSIA "does not expressly require direct ownership," the Seventh Circuit concluded that "the language and legislative history consistent with the language of the FSIA demonstrate that ATR is the type of corporation included within the statutory definition of 'foreign state.'" *Id.* at 941.

Similarly, in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), the D.C. Circuit treated an Irish company wholly owned by an instrumentality of the Irish Government as a foreign state within the meaning of the FSIA. *See id.* at 1026 & n.19. In other cases in the Second and Fourth Circuits, the status of corporations in which a foreign government indirectly owns a majority of shares as foreign states under the FSIA has not even been disputed. *See Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2d Cir. 2000) ("undisputed" that second-tier subsidiary of a state-owned corporation was a "foreign state" within meaning of FSIA); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 317 (4th Cir. 1988) (parties "agree" that

"affiliates" of state-owned corporation are "foreign states" within meaning of FSIA).

The ruling below cannot be reconciled with this authority. In this case, the Ninth Circuit held that the Dead Sea Companies were not foreign states under the FSIA even though the State of Israel owned a majority interest in them at all times relevant to the events at issue here because that ownership interest was indirect. App. 5a, 23a. The conflict between this decision and the Fifth Circuit's in *Delgado* could not be more dramatic, because in *Delgado*, the Fifth Circuit held that the Dead Sea Companies were foreign states under the FSIA. The decision below also squarely conflicts with the decisions of the Sixth Circuit in *Gould*, the Seventh Circuit in *Roselawn*, and the D.C. Circuit in *Gilson* because, in direct contradiction to the decision below, each of those decisions treated companies as foreign states under the FSIA based upon indirect state ownership. Thus, there is a four-to-one conflict among the courts of appeals over whether tiered entities such as the Dead Sea Companies can qualify as foreign states under the FSIA.

II. THE DECISION BELOW MISCONSTRUES THE FSIA.

In addition to conflicting with decisions of other circuits, the decision below is also wrong. Nothing in the FSIA requires foreign governments to directly own companies in order for those companies to qualify as "foreign states" under the FSIA.

In the absence of extraordinary circumstances, the language of a statute must be given its "'ordinary, contemporary, common meaning.'" *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The language of the FSIA at issue here states that foreign corporations "a majority of whose shares or other ownership interest is owned by a

foreign state or a political subdivision thereof" may qualify as "foreign states" under the FSIA. 28 U.S.C. § 1603(b)(2). "In common speech the stockholders would be called owners" of a corporation's assets. *Flink v. Paladini*, 279 U.S. 59, 63 (1929) (interpreting stockholders in a corporation to be the "owner" of a ship in which the corporation has title). Accordingly, the shareholders of a parent corporation are naturally understood to be owners of the parent's shares in its subsidiaries. *See, e.g., Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 61 (4th Cir. 1993) (noting that PBI is a "third-tier subsidiary" of Akzo, which "indirectly *owns* all the outstanding stock of PBI, through its direct stock ownership of Akzo Pharma") (emphasis added). Indeed, in a telling confirmation of petitioners' plain language argument, in their brief before the Ninth Circuit respondents said that the Dead Sea Companies "were majority-owned by the state of Israel." Brief of Plaintiffs-Appellants/Cross-Appellees at 7, *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001).

The decision below reached a different conclusion because it interpreted the provision in question as "limiting an instrumentality to the first tier of ownership." App. 19a. As the Fifth Circuit recognized, however, the FSIA "draws no distinction between direct and indirect ownership." *Delgado*, 231 F.3d at 176. To the contrary, it "simply requires 'ownership' by a foreign state." *Id.* In fact, the Act indicates that direct ownership is *not* required by providing for ownership either of shares or of "other ownership interest." Given the breadth of the word "interest" — it is the "most general term that can be employed to denote a right, claim, title, or legal share in something" (*Black's Law Dictionary* 729 (5th ed. 1979)) — the Act's definition of "foreign state" can easily be read to encompass ownership that is indirect in nature.

The Ninth Circuit reached a different conclusion in part out of concern about "mak[ing] the majority-shareholder

requirement superfluous." App. 20a. It reasoned that the reference to "other ownership interest" could not be read to encompass indirect stock ownership without rendering the majority-shareholding requirement meaningless. As just demonstrated, however, petitioners do not need to rely upon the "other ownership" language to succeed; state ownership of a corporation through its parent can be read quite naturally to satisfy the majority-shareholding requirement. In any event, the reference to "other ownership interest" can be read to encompass indirect ownership of shares without rendering that requirement superfluous: as this Court has recognized, where a specific term precedes a general one, "the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. Untied States*, 522 U.S. 398 404 n.2 (1998) (quotation omitted); *see also Gooch v. United States*, 297 U.S. 124, 128 (1936) (noting that this principle "limits general terms which follow specific ones to matters similar to those specified"). Thus, far from being superfluous, the majority-shareholding requirement limits the general "other ownership interest" to interests conferring a similar measure of control over the owned entity.

Moreover, the FSIA's definition of "foreign state" must be read in light of the purposes of the Act. *See, e.g., Flink*, 279 U.S. at 63 (interpreting the word owner "in a broad and popular sense in order not to defeat the manifest intent" of the statute there). Like private businesses, foreign governments often find it useful, for both legal and business purposes, to divide the operations of the businesses they own among separate but affiliated corporations. *See, e.g.*, ABA Working Group, *supra*, at 43 (noting that "at least some states structure important areas of national interest, such as natural resources, through several levels of corporations"). The United States has no interest in discouraging foreign governments from using this sort of structure. *See* H.R. Rep. No. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6614 (observing that businesses qualifying as a "foreign state" under the FSIA can "assume a variety of

forms"). "The strength of a foreign state's sovereign interests in an area do not necessarily dissipate when employing more complicated legal structures resembling those used by modern private businesses." ABA Working Group, *supra*, at 43-44. Furthermore, any attempt to dictate how foreign governments structure their state-owned businesses could very easily be seen as an intrusion upon that government's sovereignty. It would therefore be inconsistent with the underlying purposes of the FSIA to read the Act's definition of foreign states to dictate direct ownership of businesses and penalize foreign governments for engaging in the common practice of organizing their commercial interests through operating subsidiaries.

Indeed, such a reading exalts form over substance. Under the Ninth Circuit's interpretation, a corporation in which a foreign government owns 51% of the stock and thereby controls a bare majority of the board of directors would qualify as a foreign state under the FSIA. However, if that same government owned 100% of the stock in a holding company, which in turn owned 100% of an operating subsidiary, the operating subsidiary would not qualify. That makes no sense. Obviously, the foreign government would exercise greater practical control over the corporation in the latter scenario than in the former. Because the parent of a wholly owned subsidiary "may assert full control at any time if the subsidiary fails to act in the parent's best interests," *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 771-72 (1984), in the second scenario the government would maintain full control over the subsidiary's actions. In the first scenario, however, even though the foreign government would directly own a majority of the shares of the corporation, it would not have an entirely free hand because it would be obliged to take the rights and interests of minority shareholders into account. *See, e.g.*, I James D. Cox *et al.*, *Corporations* § 11.10 (2001).

Nor does the recognition of indirect ownership require courts to permit infinite looping of corporate ownership. In *Gates*, 54 F.3d 1457, the decision upon which the decision below relied, App. 19a-21a, the Ninth Circuit expressed concern that permitting indirect ownership would necessarily "provide potential immunity for every subsidiary in a corporate chain no matter how far down the line." *Gates*, 54 F.3d at 1462. That is not true. If courts focus on substance and require a foreign government to have an effective majority interest in any tiered subsidiaries that are treated as foreign states under the FSIA, not every majority-owned subsidiary of a corporation majority owned by a foreign government may qualify as a foreign state.

Indeed, under this approach a foreign government's ownership interests must be much higher than a bare majority to qualify. For example, if a foreign government owns 51% of the shares in a holding corporation, which in turn owns 51% of the shares in a subsidiary corporation, the government's ownership interest in the subsidiary would be only 26.01% (=51% x 51%). Indeed, even if the foreign state owns 70% of the shares in a parent corporation, which in turn owns 70% of the shares in a subsidiary corporation, the subsidiary would not qualify as majority owned because the state's ownership interest would be only 49% (=70% x 70%).[2] Thus, a sensible reading of the language of the FSIA does not open up the courts to a flood of FSIA claims by remote subsidiaries over which a foreign government exercises no real control. It

[2] The State of Israel retained an indirect majority interest in the Dead Sea Companies during the periods at issue in this suit because it owned virtually all of the shares in the holding companies that in turn owned virtually all of the shares in the Dead Sea Companies. For example, between 1968 and 1975, Israel owned 99.9% of Dead Sea Works Ltd., which in turn owned 99.9% of Dead Sea Bromine. SER740, SER749-50, SER754.

simply treats those corporations in which a foreign government has a truly effective majority interest as foreign states under the FSIA.

III. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S ATTENTION.

The question presented — whether foreign corporations indirectly owned by foreign governments through holding companies may qualify as foreign states under the FSIA — is a frequently recurring one. Many foreign governments own businesses that operate in the U.S. Indeed, by one account, fully two-thirds of the foreign corporations in the Fortune 500 were wholly or partially state-owned. *See* Abdullahm Al-Obaidan & Gerald W. Scully, *Efficiency Differences Between Private and State-Owned Enterprises in the International Petroleum Industry*, 24 Applied Economics 237 (1992). As noted above, *see supra* p. 16, many of these businesses are in turn organized through holding companies and operating subsidiaries, and when those subsidiaries are sued in the United States, they invoke the FSIA. Not surprisingly, questions whether these entities qualify as foreign states under the FSIA and may therefore invoke the Act's substantive and procedural protections arise frequently. In fact, the issue has arisen in more than two dozen reported decisions in the last two decades.[3]

[3] *See EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992 (9th Cir. 2001); *Delgado*, 231 F.3d 165 (5th Cir. 2000); *Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1998); *Roselawn*, 96 F.3d 932; *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995); *Gates*, 54 F.3d 1457; *Straub v. AP Green, Inc.*, 38 F.3d 448 (9th Cir. 1994); *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994); *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Am. W. Airlines, Inc. v. GPA*

As the present case shows, a conflict among the circuits over the proper treatment of these corporations can lead to directly inconsistent results, creating the very real and intolerable possibility that the availability of the FSIA's protections — including not just the right to removal but the various other statutory protections as well — turns upon the circuit in which a suit is brought. This prospect is especially troubling in light of the overall purpose of the FSIA, which was to ensure "uniformity in decision" by the judiciary. H.R. Rep. No. 94-1487, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611. Indeed, contradictory results in cases such as this one and *Delgado* may generate the very sort of protests to the Executive Branch that the FSIA was intended to avoid. *See id.* (noting that "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences"). Thus, for this reason as well, this Court should resolve the clear conflict over the application of the FSIA presented by this case.

Group, Ltd., 877 F.2d 793 (9th Cir. 1989); *Gould*, 853 F.2d 445; *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Gilson*, 682 F.2d 1022; *Dewhurst v. Telenor Invest A.S.*, 83 F. Supp. 2d 577 (D. Md. 2000); *Parex Bank v. Russian Sav. Bank*, 81 F. Supp. 2d 506 (S.D.N.Y. 2000); *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 18 n.5 (D.D.C. 1998); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996); *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas De Espana, S.A.*, 896 F. Supp. 125 (S.D.N.Y. 1995); *Credit Lyonnais v. Getty Square Assocs.*, 876 F. Supp. 517 (S.D.N.Y. 1995); *Lopez Del Valle v. Gobierno de la Capital*, 855 F. Supp. 34 (D.P.R. 1994); *D.W. Talbot v. Saipem A.G.*, 835 F. Supp. 352 (S.D. Tex. 1993); *Trump Taj Mahal Assocs. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143 (D.N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir. 1992); *Richmark Corp. v. Timber Falling Consultants*, 747 F. Supp. 1409 (D. Or. 1990), *aff'd*, 937 F.2d 1444 (9th Cir. 1991); *Outbound Mar. Corp. v. P.T. Indonesian Consortium of Constr. Indus.*, 582 F. Supp. 1136 (D. Md. 1984).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 5, 2001

APPENDIX

251 F.3d 795

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Gerardo Dennis PATRICKSON; Rodolfo Bermudez Arias; Benigno Torres Hernandez; Fernando Jimenez Arias; Santos Leandros; Herman Romero Aguilar; Elias Espinoza Merelo Hooker Era Celestino; Alirio Manuel Mendez; Carlos Humberto Rivera, individually and on behalf of others similarly situated, Plaintiffs-Appellants,

v.

DOLE FOOD COMPANY, INC.; Dole Fresh Fruit Company; Dole Fresh Fruit International, Limited; Pineapple Growers Association of Hawaii; Amvac Chemical Corporation; Shell Oil Company; Dow Chemical Company; Occidental Chemical Corporation, individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company; Standard Fruit Co.; Standard Fruit & Steamship Co.; Standard Fruit Company De Costa Rica, S.A.; Standard Fruit

Company De Honduras, S.A.; Chiquita Brands,
Inc.; Chiquita Brands International, Inc., Individually; United Brands Company, Inc., suc Chiquita Brands International, Inc.; Maritrop Trading Corporation; Del Monte Fresh Produce, N.A.; Del Monte Fresh Produce Hawaii, Inc.; Del Monte Fresh Produce Company and Fresh Del Monte N.V., Defendants-Appellees,

v.

Dead Sea Bromine Co., Ltd.; Bromine Compounds Limited,
Third-party-defendants-Appellees.

Gerardo Dennis Patrickson; Rodolfo Bermudez Arias; Benigno Torres Hernandez;
Fernando Jimenez Arias; Santos Leandros; Herman Romero Aguilar; Elias
Espinoza Merelo Hooker Era Celestino; Alirio Manuel Mendez; Carlos Humberto Rivera, individually and on behalf of others similarly situated, Plaintiffs-Appellees,

v.

Dole Food Company, Inc.; Dole Fresh Fruit Company; Dole Fresh Fruit International, Limited; Pineapple Growers Association of Hawaii; AMVAC Chemical Corporation; Shell Oil Company; Dow Chemical Company; Occidental Chemical Corporation, individually and as successor to

Occidental
Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker
Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer
Company; Standard Fruit Co.; Standard Fruit & Steamship Co.; Standard Fruit Company De Costa Rica, S.A.; Standard Fruit Company De Honduras, S.A.; Chiquita Brands, Inc.; Chiquita Brands International, Inc., individually; United Brands Company, Inc., suc Chiquita Brands International, Inc.; Maritrop
Trading Corporation; Del Monte Fresh Produce, N.A.; Del Monte Fresh Produce Hawaii, Inc.; Del Monte Fresh Produce Company and Fresh Del Monte N.V., Defendants-Appellees,

and

Dead Sea Bromine Co., Ltd.; Bromine Compounds Limited,
Third-party-defendants-Appellants.

Nos. 99-16524, 99-16770.

Argued and Submitted Aug. 9, 2000
Filed May 30, 2001

Appeals from the United States District Court for the District of Hawaii Helen Gillmor, District Judge, Presiding.
D.C. No. CV-97-01516-HG/BMK

Before: KOZINSKI, GRABER and FISHER, Circuit Judges.

KOZINSKI, Circuit Judge:

We consider whether the federal courts have jurisdiction over a class action brought by Latin American banana workers against multinational fruit and chemical companies alleged to have exposed the workers to a toxic pesticide.

I

Dibromochloropropane (DBCP) is a powerful pesticide. Tough on pests, it's no friend to humans either. Absorbed by the skin or inhaled, it's alleged to cause sterility, testicular atrophy, miscarriages, liver damage, cancer and other ailments that you wouldn't wish on anyone. Originally manufactured by Dow Chemical and Shell Oil, the pesticide was banned from general use in the United States by the Environmental Protection Agency in 1979. But the chemical companies continued to distribute it to fruit companies in developing nations.

In our case, banana workers from Costa Rica, Ecuador, Guatemala and Panama brought a class action against Dole Food Company, other major fruit companies and chemical companies (hereinafter "Dole") for injuries allegedly sustained from exposure to DBCP in their home countries. This case represents one front in a broad litigation war between these plaintiffs' lawyers and these defendants. In some of the cases, plaintiffs have reportedly won multimillion dollar settlements. *See* Larry K. Lowry & Arthur L. Frank, *Exporting DBCP and Other Banned Pesticides: Consideration of Ethical Issues*, 5 Int'l J. Occup. Envtl. Health 135, 140 (1999). In others, defendants have managed to have the cases dismissed for forum non conveniens. *See, e.g., Delgado v. Shell Oil Co.*, 231 F.3d 165, 169 (5th Cir. 2000), *cert. denied*, — U.S. —, 121 S. Ct. 1603 (2001); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1216 (11th Cir.1985).

The merits are not before us. Instead, we must decide whether the case is properly in federal court. The workers brought suit in Hawaii state court. Dole responded by impleading two Israeli chemical companies, Dead Sea Bromine Company and Bromine Compounds Limited ("Dead Sea Companies"), which are alleged to have manufactured some of the DBCP used in plaintiffs' home countries. The Companies were, until recently, indirectly owned by the Israeli government, and they immediately removed the case to federal court pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330. Dole likewise removed based on federal-question jurisdiction, 28 U.S.C. § 1331. The district court denied plaintiffs' remand motion and then dismissed the case for forum non conveniens.

II

Dole was entitled to remove the case to federal court if plaintiffs could have brought it there to begin with. *See* 28 U.S.C. § 1441(a). We must therefore consider whether plaintiffs could have brought the case in district court under federal-question jurisdiction or the FSIA.[1]

A. *Federal-Question Jurisdiction*

We are courts of limited jurisdiction. This means we hear only those cases that Congress directs and the Constitution permits us to hear. Under Article III, federal courts may assert jurisdiction over federal questions, extending to all cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2. Although any federal ingredient may be sufficient to satisfy Article III, the statutory grant of jurisdiction under 28 U.S.C. § 1331 requires more.

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[1] Because Dole Food Company is a citizen of the forum state, defendants could not remove based on diversity of citizenship. *See* 28 U.S.C. § 1441(b).

See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983) ("Article III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331 . . . .").

Even if the case turns entirely on the validity of a federal defense, federal courts may not assert jurisdiction unless a federal right or immunity is "an element, and an essential one, of the plaintiff's cause of action." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 11 (1983) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936)). This venerable "well- pleaded complaint" rule keeps us from becoming entangled in state law controversies on the conjecture that federal law may come into play at some point during the litigation; it also ensures that Congress retains control over the size of federal court dockets.

Under conventional principles, the class action here unquestionably arises under state law. Plaintiffs seek relief under the common law of Hawaii for negligence, conspiracy, strict liability, intentional torts and breach of implied warranty. None of the claims has an element premised on a right created by Congress or the Constitution. Dole nonetheless argues that we have federal-question jurisdiction because the case calls for an application of the federal common law of foreign relations.

Although there is no general federal common law, "there are enclaves of federal judge-made law which bind the States." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). In *Sabbatino*, the Court held that one of those enclaves concerns the legal principles governing the nation's relationship with other members of the international community. The case considered whether the "act of state doctrine" requires U.S. courts to recognize the validity of the Cuban government's expropriation of private property. A long-standing common law principle, the act of state doctrine precludes courts from questioning the legality of actions that a foreign government has taken within its own borders. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). *Sabbatino*

considered whether the doctrine was a matter of state or federal law.

Because the Constitution gives the federal government exclusive authority to manage the nation's foreign affairs, the Court concluded that "rules of international law should not be left to divergent and perhaps parochial state interpretations." *Sabbatino*, 376 U.S. at 425. Whether a foreign state's act is given legal force in the courts of the United States is a "uniquely federal" question directly implicating our nation's foreign affairs. *See id.* at 425-26. Therefore, it was appropriate to fashion a single federal standard to govern such cases, rather than rely on a patchwork of separate state standards. Equally important, the Supreme Court in *Sabbatino* reserved to itself ultimate review of all cases raising the act of state doctrine, rather than leaving them to the various state supreme courts. *See Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965) (Friendly, J.) (*Sabbatino* held that "all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States.").

Federal-question jurisdiction was not an issue in *Sabbatino*; the district court already had jurisdiction because of diversity of citizenship. The question presented was what substantive law would apply-state law pursuant to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), or federal law. *Sabbatino* held that the common law of foreign relations falls outside *Erie* 's general rule and so federal law applies. *See Sabbatino*, 376 U.S. at 425. Federal common law is, of course, federal law; so if a plaintiff's claim arises under the federal common law recognized by *Sabbatino*, the federal courts will have jurisdiction under 28 U.S.C. § 1331.[2] *See Illinois v. City of*

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[2] Although the act of state doctrine generally serves as a defense, it can also be used affirmatively as the basis of a claim. *See* Restatement (Third) of Foreign Relations Law § 443 cmt. i (1986) (noting that an act of state

Milwaukee, 406 U.S. 91, 100 (1972) (" § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.").

This is as far as *Sabbatino* goes, and it's not far enough, because nothing in plaintiffs' complaint turns on the validity or invalidity of any act of a foreign state. Plaintiffs seek compensation for injuries sustained from the defendants' manufacture, sale and use of DBCP. Plaintiffs don't claim that any foreign government participated in such activities or that the defendants acted under the color of foreign law. The case-at least as framed by plaintiffs-does not require us to evaluate any act of state or apply any principle of international law. The common law of foreign relations will become an issue only when-and if-it is raised as a defense.

Dole nonetheless argues that we must assert federal-question jurisdiction because the case concerns a vital sector of the economies of foreign countries and so has implications for our nation's relations with those countries. Plaintiffs represent a class of perhaps thousands of foreign nationals who allege that large multinational corporations harmed them in their home countries.[3] Dole argues that, by

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may be "necessary to a litigant's claim or defense"); *see also Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir.1986) ("We hold that federal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state."); *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 854 (2d Cir.1962) (plaintiff must establish title as an element of his conversion claim, and title rests on the Cuban expropriation decree), *rev'd on other grounds, Sabbatino*, 376 U.S. 398.

[3] As the district court recognized, such claims may raise serious questions of forum non conveniens under federal and state law. Of course, the federal courts may decide that issue only if we have jurisdiction over the case.

granting relief, American courts would damage the banana industry-one of the most important sectors of those countries' economies-and cast doubt on the balance those governments have struck between agricultural development and labor safety. Although plaintiffs allege only state law claims, Dole argues, this case implicates the "uniquely federal" interest in foreign relations, and so must be heard in a federal forum. In essence, Dole interprets *Sabbatino* as creating an exception not only to *Erie*, but to the well-pleaded complaint rule as well.

Dole's position is not without support. In *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997), the Fifth Circuit asserted federal-question jurisdiction over a state tort action brought by hundreds of Peruvian citizens against an American company because of injuries they had allegedly suffered from exposure to toxic gases during copper smelting and refining operations in Peru. The court concluded that, although the Peruvian government was not a party, it had "participated substantially" in the mining project through ownership of the land and minerals on which the mining operation was located. *See id.* The court also noted that the mining industry made up a significant part of Peru's gross national product, and the Peruvian government had vigorously protested to our State Department that the case threatened Peru's sovereign interests. As a consequence, the Fifth Circuit held that the "plaintiffs' complaint raises substantial questions of federal common law by implicating important foreign policy concerns." *Id.* While reaching the opposite result on the facts before it, the Eleventh Circuit seems to have adopted the Fifth Circuit's theory in *Torres*. *See Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1377 (11th Cir. 1998) (noting that, "[w]here a state law action has as a substantial element an issue involving foreign relations or foreign policy matters, federal jurisdiction is present" but concluding that a suit brought by Venezuelan citizens injured in a pipeline explosion did not affect American foreign policy).

Torres and *Pacheco de Perez* relied principally on *Republic of Philippines v. Marcos*, 806 F.2d 344, 353 (2d Cir. 1986), which seems to have been the first case to conclude that "there is federal question jurisdiction over actions having important foreign policy implications."[4] In *Marcos*, the Republic of the Philippines sued its former dictator to enjoin him from disposing of property allegedly looted from the government and claimed as state property under an executive order of the Philippine government. *See id.* at 347. Because the Republic's claims rested on the Philippine executive order, *Marcos* could be read as an act of state case, and the Second Circuit may well have grounded federal jurisdiction entirely on that basis. *See id.* at 354 ("[F]ederal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether . . . the American courts [should] enforce the foreign government's directives to freeze property. . . .").

However, *Marcos* clearly *said* more, broadly suggesting that federal- question jurisdiction could "probably" be premised on the fact that a case may affect our nation's foreign relations, whether or not federal law is raised by the plaintiff's complaint: "[A]n action brought by a foreign government against its

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[4] Torres relied on only one other case, *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), which was an antitrust case that had nothing to do with foreign relations. *Torres* cited *Texas Industries* apparently because it, in turn, cited *Sabbatino*. *See Texas Indus.*, 451 U.S. at 641.

Torres also distinguished *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir. 1992), which had held that the well-pleaded complaint rule applies with full force to cases arising under the federal common law of foreign relations. In *Aquafaith*, the defendants alleged that a maritime suit arose under federal law because the Philippine government had involved itself with the plaintiff's claims. *Aquafaith* rejected the claim on the ground that the foreign government's involvement didn't appear anywhere in the plaintiff's complaint. *Id.* at 809. *Torres* concluded that the plaintiff's claims in *Aquafaith* had not "necessarily implicate[d] vital economic and sovereign interests" of a foreign power, as they did in *Torres*. 113 F.3d at 542 n.8.

former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations." *Id.*[5] This reads far too much into *Sabbatino*. As noted, *Sabbatino* was about choice of law, not jurisdiction. The Court left no doubt that the substantive law of foreign relations must be federal, and it stressed the need for national uniformity. But *Sabbatino* does not say that federal courts alone are competent to develop this body of law. To the contrary, *Sabbatino* notes that the law of foreign relations is like other "enclaves of federal judge-made law which bind the States," such as the rules filling the interstices of federal statutes and the laws regulating interstate boundary issues. *Sabbatino*, 376 U.S. at 426. The Court's reference to binding the states makes sense only if one assumes that state courts will be called upon to apply the law of foreign relations. *Sabbatino* says as much: "[T]he act of state doctrine is a principle of decision binding on federal and state courts alike. . . ." *Id.* at 427; *see also* Henry Friendly, *In Praise of Erie-and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405

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[5] In reaching this conclusion, the Second Circuit relied on several authorities, none particularly helpful, among them Judge Friendly's opinion in *Republic of Iraq*, 353 F.2d at 50. To be sure, Judge Friendly stressed the need for national uniformity in cases concerning foreign acts of state, but *Republic of Iraq*, like *Sabbatino*, was a diversity case and thus has nothing to say about federal-question jurisdiction.

Marcos also seemed to draw support from *Franchise Tax Board*, 463 U.S. at 23, where the Supreme Court noted that federal-question jurisdiction may exist "even though the plaintiff pleads a state cause of action if federal law 'is so powerful as to displace entirely any state cause of action.' " *Marcos*, 806 F.2d at 354 (quoting *Franchise Tax Bd.*, 463 U.S. at 23). We find this reference to *Franchise Tax Board* curious. While the Supreme Court acknowledged that a state action may arise under federal law when Congress has established a federal cause of action preempting state law, *see Franchise Tax Bd.*, 463 U.S. at 23-24 (citing *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968)), we fail to see what analogous federal action *Marcos* had in mind when it suggested that a state dispute over real property might have been preempted by federal law.

(1964) ("*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum. . . .").

State courts apply federal law in a wide variety of cases and, by doing so, they necessarily develop it. This does not undermine the nationwide uniformity of federal law much more than having somewhat different applications of federal law in the various federal circuits. Ultimately, the Supreme Court has the final say on any question of federal law, whether it arises in federal or state court, and this is thought sufficient to ensure nationwide uniformity in areas as diverse as criminal procedure, patent law and labor law.[6]

We see no reason to treat the federal common law of foreign relations any differently than other areas of federal law. Certainly, federal courts have preeminence in developing all areas of federal law by virtue of the fact that almost all cases premised on federal law may be brought in or removed to federal court. In addition, Congress has provided federal jurisdiction in certain cases implicating our foreign relations, regardless of the nature of the claim. *See, e.g.*, 28 U.S.C. § 1251(b)(1) (suits where ambassadors or other foreign government officials are parties); *id.* § 1351 (suits against foreign consuls or other diplomatic personnel); *id.* § 1330 (suits against a foreign state); *see also id.* § 1350 (suits

[6] *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (reviewing state interpretation of First Amendment); *Troxel v. Granville*, 530 U.S. 57 (2000) (reviewing state interpretation of substantive due process); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (reviewing state interpretation of the Fourth Amendment); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (reviewing state interpretation of dormant Commerce Clause); *Oregon v. Elstad*, 470 U.S. 298 (1985) (reviewing state interpretation of the Fifth Amendment); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) (reviewing state decision under the patent laws); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (reviewing state interpretation of federal labor laws).

brought by an alien for a tort committed in violation of international law). What Congress has not done is to extend federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue. We interpret congressional silence outside these specific grants of jurisdiction as an endorsement of the well-pleaded complaint rule.

We therefore decline to follow *Marcos, Torres* and *Pacheco de Perez* insofar as they stand for the proposition that the federal courts may assert jurisdiction over a case simply because a foreign government has expressed a special interest in its outcome. *Accord In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 36-38 (D.D.C. 2000). It may well be that our foreign relations will be implicated by the pendency of a lawsuit on a subject that affects that government's sovereign interests; the courts in *Marcos* and *Torres* certainly believed this to be the case. But we see no logical connection between such an effect and the assertion of federal-question jurisdiction. That the case is litigated in federal court, rather than state court, will not reduce the impact of the case on the foreign government. Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they tailor their rulings to accommodate a non-party. Federal judges, like state judges, are bound to decide cases before them according to the rule of law. If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate up to and including passing legislation. Our government may, of course, communicate its own views as to the conduct of the litigation, and the court- whether state or federal-can take those views into account.[7] But it is quite a different matter to suggest that

[7] As Judge Paul Friedman noted *In re Tobacco Litigation:*

[T]o the extent that the United States government is concerned about

courts-state or federal-will tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party.

Nor do we understand how a court can go about evaluating the foreign policy implications of another government's expression of interest. Assuming that foreign relations are an appropriate consideration at all, the relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States. That is an inherently political judgment, one that courts- whether state or federal-are not competent to make. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts. . . ."); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial."); *In re Tobacco Litig.*, 100 F. Supp. 2d at 38 ("[T]he federal courts have little context or expertise by which to analyze and address the potential implications of a lawsuit on foreign relations."). If courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation, dismiss it on some ground such as forum non conveniens, or deal with it in some

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potential adverse foreign relations consequences from the resolution of these lawsuits, the Executive Branch possesses the competence, capacity and incentive to make its view known either to this Court or the state courts in which the suits were brought. The Executive Branch is responsible for the conduct of foreign affairs and may address any potential foreign relations issues that may arise in these cases. 100 F. Supp. 2d at 38.

other way.[8] *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1667 (1997). Because such political judgments are not within the competence of either state or federal courts, we can see no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such concerns.[9]

As Justice Frankfurter noted in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959), federal courts must be hesitant "to expand the jurisdiction of the

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[8] We note, for example, that the Fifth Circuit in *Torres* had before it an amicus brief from the government of Peru, but none from our own government. Based on Peru's representations, the court concluded that Peru had a vital interest in the case and the litigation might adversely affect Peru's relations with the United States. *See Torres*, 113 F.3d at 542-43. Apparently, the Fifth Circuit believed that it served the interests of the United States to avoid this consequence, so it asserted jurisdiction and affirmed the dismissal on grounds of forum non conveniens. *See id.* at 543-44. But it is just as plausible that our government did not express its views because it was indifferent to Peru's discomfort or even reveled in it. Courts should not put themselves in the position of having to make such judgments.

[9] We are particularly troubled by the suggestion in *Pacheco de Perez* (echoed by Dole in our case) that federal jurisdiction will hinge on whether a foreign government has taken a position in support or in opposition to the litigation. *See* 139 F.3d at 1378. The Eleventh Circuit noted that the Peruvian government in *Torres* had opposed the litigation, both in a communication to our State Department and an amicus brief filed in the Fifth Circuit. The Eleventh Circuit found it significant that, by contrast, "the Venezuelan government has taken no position on whether [the *Pacheco de Perez*] lawsuit proceeds in the United States or in Venezuela." *Id.* Inviting foreign governments to tell us how litigation in our courts affects their interests can only put us in the awkward position of causing an affront to those governments if their interests are not respected. We consider it far more prudent to state clearly that the effect of the litigation on the economies of foreign countries is of absolutely no consequence to our jurisdiction.

federal courts through a broad reading of jurisdictional statutes." If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving us that jurisdiction. Because we see no evidence that Congress meant for the federal courts to assert jurisdiction over cases simply because foreign governments have an interest in them, we must part company with our sister circuits. *Accord In re Tobacco Litig.*, 100 F. Supp. 2d at 36.

B. *Foreign Sovereign Immunities Act*

As an alternative source of jurisdiction, the Dead Sea Companies argue that they are instrumentalities of a foreign state under the FSIA. *See* 28 U.S.C. §§ 1330, 1603. The FSIA grants the federal courts jurisdiction over an action brought against "an agency or instrumentality of a foreign state," *id.* § 1603(a), which is defined to include any entity that is "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2).

Until the 1990s, the government of Israel indirectly owned a majority of shares in both companies by owning all the shares of their parent, Israel Chemicals Limited. An Israeli statute, the Government Companies Law, granted the Israeli government a veto over certain decisions of the Dead Sea Companies, including the appointment of the directors and officers, changes in their capital structures, and the use of corporate profits. The Companies also emphasize that the government of Israel exerted control over them through the state's ownership of the Dead Sea's mineral resources on which the Companies relied for their enterprise.

1. The Israeli government privatized most of its holdings in Israel Chemicals Limited during the 1990s and so, by the time this suit was filed in 1997, the government no longer

owned, indirectly or otherwise, a majority of the shares in the Dead Sea Companies. Because the FSIA grants jurisdiction to the federal courts where an entity "*is* an organ of a foreign state or political subdivision thereof," *id.* § 1603(b)(2) (emphasis added), we must first consider what the meaning of "is," is.[10] Does the FSIA apply to companies that were owned by the state at the time of the allegedly tortious conduct, but have since been cut free?

In *Straub v. A P Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994), we held that the FSIA applies when a party is a state instrumentality at the time the lawsuit is filed, even though it was not an instrumentality at the time of the alleged wrongdoing. *Straub* did not decide whether the FSIA would also apply in the converse case involving entities that were no longer instrumentalities, but had been at the time of the alleged wrongdoing. *See id.* However, all courts that have considered the issue have held that the FSIA applies to an entity that was a foreign state at the time of the wrongdoing, even if the entity is no longer a state instrumentality. *See, e.g., Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1381-82 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988).

We do not find this question as easy as the unanimity of other circuits would suggest. By its terms, the FSIA applies only to an entity that "is" a foreign state at the time of the suit. 28 U.S.C. § 1603(b)(2). The statute does not say that it applies to an entity that used to be a state, although Congress could easily have said so. Moreover, the statute contains special rules for service of process on the foreign state, *see id.* § 1608, and for enforcing a judgment against the foreign state.

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[10] We are not the first federal employees to tackle this question. *See* Robert Blecker, *How Does Congress Define "Perjury"?*, Wall St. J., Dec. 9, 1998, at A22.

See id. §§ 1609-10. We have no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states.

It is unclear that the policies of the FSIA would be served by extending that immunity to entities that are now private but were state actors at the time of the alleged wrong. The FSIA seeks to avoid affronting other governments by making it hard for private litigants to haul them into court. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality op.). Wrongs committed by foreign nations are presumed to raise questions of foreign policy rather than law, and an aggrieved party ordinarily must seek redress through diplomatic channels, rather than through a civil complaint. *See id.* (quoting *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 146 (1812)). But when the entity is no longer part of the foreign state, it is not clear that the civil suit will force the state to appear and defend itself in an American tribunal.[11] Nor will American courts necessarily have to worry about ordering a foreign state to pay money to a private litigant. At the same time, diplomatic channels may be of no avail in resolving a dispute between private parties.

Of course, a case against an entity formerly owned by the state may raise other kinds of concerns. Where the defendant was a foreign state at the time of the alleged wrong, the complaint perforce alleges that the foreign state did something wrong. By adjudicating that claim, the court may have to pass judgment on the acts or decisions of a foreign sovereign. But

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[11] We recognize that state officials formerly involved with the then-state entity might be drawn into the litigation, for instance as key witnesses, a circumstance that might affect the immunity analysis. *Cf. Clinton v. Jones*, 520 U.S. 681, 720 (1997) (Breyer, J., concurring) (noting that "the Court, in numerous other cases, has found the problem of time and energy distraction a critically important consideration militating in favor of a grant of immunity.").

the merits of such acts may well be insulated from judicial scrutiny by the act of state doctrine and, in any event, the affront to the foreign sovereign will be remote and indirect if it is not held answerable for the harm it may have caused. If concern over adjudicating whether the foreign sovereign acted wrongfully were the key to FSIA immunity, *Straub* should have come out the other way because the entity that committed the wrong there was not a government entity at the time of the alleged wrongdoing. There is thus a plausible basis for concluding that the FSIA does not come into play where a suit is brought against a private entity that was a foreign state at the time of the alleged wrongdoing, but is no longer.

However, the question is a close one, and the answer is ultimately not dispositive here. We will therefore assume for the purposes of this case that the FSIA would grant federal jurisdiction over an entity that at the time of the tortious conduct was-but no longer is-a government instrumentality.

2. Proceeding on that assumption, we turn to whether the Dead Sea Companies were in fact instrumentalities of the Israeli government. In *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995), we held that under the FSIA, a corporation owned by an instrumentality of a foreign government is not itself an instrumentality of that government. An instrumentality includes any entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). *Gates* read that provision as limiting an instrumentality to the first tier of ownership: those entities owned directly by the foreign state itself or by a political subdivision. It held that a corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the FSIA.

Because the Dead Sea Companies were never owned directly by the Israeli government, *Gates* would seem to foreclose their claim to be instrumentalities through stock ownership. Because they must, the Companies do their best to

distinguish *Gates*. First, they argue that *Gates* did not consider whether the indirect ownership of stock qualified as an "other ownership interest" under section 1603(b)(2). An instrumentality under the FSIA includes entities in which the foreign government owns a majority of the shares or some "other ownership interest." We decline to read "other ownership interest" in such a way as to make the majority-shareholder requirement superfluous. Instead, we read it simply to describe some other form of ownership not called shares of stock. That provision does not include the indirect ownership of shares specifically foreclosed by *Gates*.

Second, the Dead Sea Companies suggest that *Gates* held only that the subsidiary of an *organ* of a foreign state is not an instrumentality, while a subsidiary of a state-owned corporation may be one. We see no rationale supporting such a distinction. If anything, we would more readily view an organ of a foreign state as an extension of the government than we would so view a state-owned business. Moreover, we already have read *Gates* for the broader holding that "an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof.'" *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (describing the holding in *Gates*). Because an instrumentality under the FSIA includes both organs and government-owned corporations, *Gates*'s holding covers the Israeli government's interest in the Dead Sea Companies.

The Companies point out that several other circuits have disagreed with *Gates* and held that subsidiaries of a corporation owned by a foreign state are in fact instrumentalities under the FSIA. *See, e.g., Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, — U.S. ---, 121 S. Ct. 1603 (2001); *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 941 (7th Cir. 1996); *Gould*, 853 F.2d at 448-50. They argue, not implausibly, that

federal courts should not care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation. But none of this matters, because *Gates* decided this question, and we are bound by its authority.

3. In the alternative, the Dead Sea Companies argue that they were "organs" of the Israeli government under section 1603(b)(2). In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government. In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law. *See Corporacion Mexicana*, 89 F.3d at 654-55; *Gates*, 54 F.3d at 1461. The entity may be an organ even if it has some autonomy from the foreign government. *See id.* ("[T]hat the [state] is not directly involved in the day-to-day activities of [the entity] does not mean that it is not exercising control over the entity. . . .").

Courts have recognized as organs such quasi-public entities as national banks, state universities and public television networks. In *Gates*, we held that an industry board that regulated the Canadian pork market was an organ where it exercised regulatory authority delegated by the government; its decisions could be appealed to a government agency; and its members enjoyed immunity from suit for their official duties. *See id.* Closer to our case, we have held that a Mexican oil refinery was an organ where it was entirely owned by the government; controlled by government appointees; employed only public servants; and had the exclusive responsibility for refining and distributing Mexican government property. *See Corporacion Mexicana*, 89 F.3d at 654-55; *see also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 848 (5th Cir.) (a Syrian petroleum company was a government organ where

Syria had created the company and granted it exclusive rights to exploit the country's petroleum reserves for the benefit of the state, rather than in pursuit of profits, and half the directors were high-level government officials), *cert denied*, --- U.S. ---, 121 S. Ct. 426 (2000).

The Dead Sea Companies argue that, like the oil company in *Corporacion Mexicana*, the Companies were government organs created by Israel for the purpose of exploiting the Dead Sea resources owned by the government. The Dead Sea Companies were classified as "government companies" under Israeli law, which gave the government certain privileges reflecting its ownership stake. The government had the right to approve the appointment of directors and officers, as well as any changes in the capital structure of the Companies, and the Companies were obliged to present an annual budget and financial statement to various government ministries. The government could constrain the use of the Companies' profits as well as the salaries of the directors and officers.

Although Israeli law granted such authority directly to the Israeli government, it is not considerably different from the control a majority shareholder would enjoy under American corporate law. In contrast to the oil refinery in *Corporacion Mexicana*, the Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies wholly owned by the government of Israel. The Companies could sue and be sued, and could in fact sue the government of Israel (although official Israeli documents describe such disputes as between "a government company and another government body"). Nor did the Companies exercise any regulatory authority, as did the entity in *Gates*. These factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than

pursue public objectives.[12] Although the question is close, we hold that the Dead Sea Companies were not organs of the Israeli government, but indirectly owned commercial operations, which do not qualify as instrumentalities under the FSIA.

III

The federal courts do not have jurisdiction over this case under either 28 U.S.C. § 1331 or 28 U.S.C. § 1330. Accordingly, we **REVERSE** the judgment of the district court and **REMAND** with instructions that the district court remand the case to Hawaii state court.

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[12] These factors also distinguish the Dead Sea Companies from the Syrian oil company in *Kelly*, 213 F.3d at 847-48, which was a non-profit- making entity, half of whose directors were high-level Syrian government officials.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERARDO DENNIS PATRICKSON;
RODOLFO BERMUDEZ ARIAS;
BENIGNO TORRES HERNANDEZ;
FERNANDO JIMENEZ ARIAS;
SANTOS LEANDROS; HERMAN ROMERO
AGUILAR; ELIAS ESPINOZA
MERELO HOOKER ERA CELESTINO;
ALIRIO MANUEL MENDEZ; and
CARLOS HUMBERTO RIVERA,
individually and on behalf of
others similarly situated,

Plaintiffs,

vs.

DOLE FOOD COMPANY, INC.;
DOLE FRESH FRUIT COMPANY;
DOLE FRESH FRUIT INTERNATIONAL,
LIMITED; DOLE FRESH FRUIT
INTERNATIONAL, INC.; PINEAPPLE
GROWERS ASSOCIATION OF HAWAII;
AMVAC CHEMICAL CORPORATION;
SHELL OIL COMPANY; DOW CHEMICAL
COMPANY; OCCIDENTAL CHEMICAL
CORPORATION (individually and
as successor to Occidental
Chemical Agricultural Products,
Inc., Hooker Chemical and
Plastics, Occidental Chemical
Company of Texas and Best
Fertilizer Company); STANDARD
FRUIT COMPANY; STANDARD FRUIT

AND STEAMSHIP COMPANY; STANDARD
FRUIT COMPANY de COSTA RICA,
S.A.; STANDARD FRUIT COMPANY de
HONDURAS, S.A.; CHIQUITA
BRANDS, INC.; CHIQUITA BRANDS
INTERNATIONAL, INC.
(individually and as successor
in interest to United Brands
Company, Inc.); MARITOP
TRADING CORPORATION; DEL MONTE
FRESH PRODUCE, N.A.; DEL MONTE
FRESH PRODUCE COMPANY; DEL
MONTE FRESH PRODUCE HAWAII
INC.; DEL MONTE FRESH PRODUCE
COMPANY AND
FRESH DEL MONTE N.V.; JOHN
DOES 1-10; JANE DOES 1-10;
DOE PARTNERSHIPS 1-10; and
DOE CORPORATIONS 1-10.

Defendants.

CIVIL NO. 97-01516 HG

ORDER DENYING PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO THE DEAD SEA DEFENDANTS' ASSERTION OF FOREIGN SOVEREIGN IMMUNITIES ACT JURISDICTION and DENYING PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO THE SUPPLEMENTAL GROUNDS FOR REMOVAL and GRANTING CERTAIN DEFENDANTS' MOTION TO DISMISS AND FOR INJUNCTIVE RELIEF

FILED DECEMBER 24, 1997 and
DENYING PLAINTIFFS' MOTION TO
STRIKE DEFENDANTS'
SUPPLEMENTAL AFFIDAVITS

ORDER DENYING PLAINTIFFS' MOTION FOR
REMAND AND IN
OPPOSITION TO THE DEAD SEA DEFENDANTS'
ASSERTION OF
FOREIGN SOVEREIGN IMMUNITIES ACT
JURISDICTION
and
DENYING PLAINTIFFS' MOTION FOR REMAND AND
IN OPPOSITION TO
THE SUPPLEMENTAL GROUNDS FOR REMOVAL
and
GRANTING CERTAIN DEFENDANTS' MOTION TO
DISMISS AND FOR
INJUNCTIVE RELIEF FILED DECEMBER 24, 1997
and
DENYING PLAINTIFFS' MOTION TO STRIKE
DEFENDANTS'
SUPPLEMENTAL AFFIDAVITS

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. This action is currently before the Court on 1) Plaintiffs' Motion for Remand and In Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction; 2) Plaintiffs' Motion for Remand and In Opposition to the Supplemental Grounds for Removal; and 3) Certain Defendants' Motion to Dismiss and for Injunctive Relief filed December 24, 1997. For the reasons set forth below, the Court finds 1) that removal

under the Foreign Sovereign Immunities Act was not proper; 2) removal under the supplemental grounds for removal was proper; 3) the action should be dismissed on forum non conveniens grounds; and 4) no injunction will issue prohibiting the filing of further suits relating to the issues in this action.

I. BACKGROUND

On October 3, 1997, Plaintiffs commenced this action by filing a complaint in the Circuit Court of the First Circuit of the State of Hawaii. Plaintiffs' complaint, as amended and set forth in the Amended Complaint filed March 3, 1998, was filed by nine foreign plaintiffs who are residents of the countries of Costa Rica, Ecuador, Guatemala, and Panama. Plaintiffs bring this action as a class action on behalf of themselves and others similarly situated. Defendants in this action consist of 20 corporations, some of which have principal places of business outside of the United States.

Plaintiffs allege that as a result of their exposure to DBCP, they have suffered serious and permanent injuries. They claim that Defendants are liable under various causes of action for manufacturing, selling, distributing, supplying and designing DBCP products. Specifically, Plaintiffs set forth claims of 1) negligence; 2) conspiracy; 3) strict liability; 4) intentional tort; 5) breach of implied warranty; 6) compensatory damages; and 7) punitive damages.

On October 31, 1997, Defendant Dole Food Company, Inc. filed a third-party complaint in the action naming Dead Sea Bromine Co., Ltd. ("Dead Sea") and Bromine Compounds Limited ("BCL") (collectively, the "Dead Sea Defendants") as third-party defendants.

On October 31, 1197, the Dead Sea Defendants removed the action to this Court by timely filing a Notice of Removal. Removal was made under 28 U.S.C. § 1441(d) which allows for removal by an entity covered by the Foreign Sovereignty Immunities Act ("FSIA"), 29 U.S.C. § 1602-1611.

On November 3, 1997, Defendant Dole Food Company, Inc. timely filed a Supplemental Notice of Removal which was consented to by all of the other defendants. The Supplemental Notice of Removal states that federal question jurisdiction and diversity jurisdiction provide supplemental bases for subject matter jurisdiction.

On December 2, 1997, Plaintiffs filed a Motion for Remand and in Opposition to the Supplemental Grounds for Removal and on December 3, 1997, Plaintiffs filed a Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction. On March 19, 1998, Defendants filed an Opposition to Plaintiffs' motions to remand. On March 26, 1998, Plaintiffs filed a reply. On March 19, 1998, the Dead Sea Defendants filed an opposition to Plaintiffs' Motion for remand. On March 25, 1998, Plaintiffs filed a reply.

On December 24, 1997, all of the Defendants in the action at the time, with the exception of Defendant AMVAC Chemical Corporation, filed a Motion to Dismiss and for Injunctive Relief. On March 19, 1998, the Dead Sea Defendants filed a statement of consent in connection with the motion to dismiss and for injunctive relief. Plaintiffs filed a response to Defendants' motion on March 18, 1998. On March 26, 1998, Defendants filed a reply. On April 3, 1998, Plaintiffs filed a motion to strike certain supplemental affidavits attached to Defendants' reply. A hearing on Plaintiffs' motions for remand and motion to strike and on Defendants' motion to dismiss and for injunctive relief was held on April 6, 1998.

II. PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO FOREIGN SOVEREIGNTY IMMUNITIES ACT JURISDICTION

A. *Standard of Review*

Where a case is removed to federal court there is a strong presumption against federal court jurisdiction. *Gaus v. Miles*,

980 F.2d 564, 566 (9th Cir. 1992) (citing *Nishimoto v. Federman Bachrach & Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990)). The defendant, who is the removing party, bears the burden of proving the propriety of removal, including jurisdiction. *Id.; Nishimoto*, 903 F.2d at 712 n.3; *Trenton v. Infinity Broadcasting Corp.*, 865 F. Supp. 1416, 1421 (C.D. Cal. 1994). The Ninth Circuit strictly construes the removal statute against removal jurisdiction. *Gaus*, 980 F.2d at 566; *Dunn v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 850 F. Supp. 853, 855 (N.D. Cal. 1994). Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *Id.* In determining whether they should remand a removed civil action due to lack of subject matter jurisdiction, courts should resolve any doubt in favor of remand. 28 U.S.C.A. §§ 1441(a), 1447(c). *See St. Francis Hosp. and Med. Ctr. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 776 F. Supp. 659, 661 (D. Conn. 1991).

B. *Foreign State Status Under the FSIA*

The Dead Sea Defendants removed Plaintiffs' Complaint pursuant to 28 U.S.C. § 1441(d) which provides that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) . . . may be removed by the foreign staff[.]" 28 U.S.C. § 1441(d). The issue now before the Court is whether the Dead Sea Defendants qualify as foreign states under 28 U.S.C. § 1603(a). The definition of a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). The parties do not contend that Dead Sea and BCL acted as political subdivisions of Israel, therefore, the court must decide whether the Dead Sea Defendants are agencies or instrumentalities of Israel as defined in 28 U.S.C. § 1603(b).

The FSIA defines "agency or instrumentality" as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state . . ., and
>
> (3) which is neither a citizen of a State of the United States . . ., nor created under the laws of any third country.

28 U.S.C. § 1603(b). In the instant case, there is no dispute that Defendants satisfy the first and third requirements for agency or instrumentality status; the parties only dispute whether the second requirement is satisfied.

Defendants contend that Dead Sea and BCL are agencies and instrumentalities of Israel. They assert that they are organs of the State of Israel and that the State of Israel, at all relevant times, held a majority ownership interest in both Dead Sea and BCL. Plaintiffs argue that the Dead Sea Defendants are not organs of Israel and that the State of Israel does not directly own a majority of shares of either Dead Sea Defendant.

Plaintiffs and Defendants also disagree as to what time period is relevant to making the determination of foreign state status. Defendants argue that the relevant period is the period of the alleged wrongdoing. Plaintiffs disagree, and urge the Court to look to the date upon which the complaint was filed, October 3, 1997.

1. *Relevant Time Period for Determining Foreign Sovereign Status*

At the time the suit was filed, Israel was only a minority shareholder of the Dead Sea Defendants. (Dead Sea Defendants' Notice of Removal, at ¶ 4(d); Declaration of Motti

Levin, ¶ 5, attached as Exh. 5 to Plaintiffs' Motion for Remand and In Opp. to Dead Sea Defendants' Assertion of PSIA Jurisdiction.) Defendants contend that this does not affect removal under 28 U.S.C. ¶ 1441(d) because foreign sovereign status at the time of the alleged wrongdoing is sufficient for removal of the action.

The issue of whether the FSIA applies when foreign sovereign status which existed at the time of the alleged wrongdoing is subsequently lost has been addressed by two circuits. In *Gould, Inc. v. Pechiney Uqine Kuhlmann*, 853 F.2d 445, 447 (6th Cir. 1988), a defendant which was majority-owned by France at the time of the alleged wrongdoing moved to dismiss the complaint on the basis of lack of subject matter jurisdiction under the FSIA. During the pendency of an interlocutory appeal, that defendant's corporation's shares were sold to private entity. *Id.* at 449. On appeal, the plaintiff contended that because France was no longer a majority owner of the defendant, the defendant could not qualify as a foreign state and would not be immune with respect to its conduct after the change of ownership. *Id.* The Sixth Circuit rejected the plaintiff's argument, stating, "[a]s to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts." *Id.* at 450. The court found that determination of whether a party is subject to the court's jurisdiction under the FSIA should be based upon a party's status at the time the act complained of occurred. *Id.*

In *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993), the plaintiffs filed suit against Air Canada and other defendants claiming that they conspired to suppress information about a plaintiff's financial status. *Id.* at 1379. Air Canada moved to dismiss on the basis that at the time of the alleged wrongdoing, it qualified as a foreign state under the FSIA. *Id.* Rejecting the plaintiff's arguments that the FSIA did not apply because Air Canada was no longer foreign owned

at the time suit was filed, the district court found that Air Canada was entitled to immunity under the FSIA and granted the motion to dismiss. *Id.* The Eighth Circuit affirmed, holding that FSIA immunity applies to an entity which qualified as a "foreign state" at the time of the alleged wrongdoing but not at the time the suit was filed. *Id.* 1380-82. In coming to its conclusion, the court rejected the same argument that Plaintiffs in this action make regarding the use of the present tense in the FSIA. *Id.* at 1381. The court found that use of the present tense in the FSIA did not mean that immunity under the FSIA exists only if an entity is a foreign state at the time suit is brought. *Id.* The court reasoned that "[t]he doctrine of foreign state sovereign immunity was 'created to effectuate general notions of comity among nations.' . . . [t]he foreign policy concerns discouraging us from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit." *Id.* (citations omitted).

This Court finds the reasoning of the Sixth and Eighth Circuits to be persuasive. The FSIA sets forth the general rule that foreign states are immune from the jurisdiction of federal and state courts. *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 706 (9th Cir. 1992). The suit is premised on facts that existed at the time of the alleged wrongdoing. *See Gould*, 853 F.2d at 450. The absence of foreign state status at the time the suit was filed does not negate the foreign policy concerns underlying the doctrine of sovereign immunity. Grossman, 991 F.2d at 1382.

Plaintiffs point to two Ninth Circuit decisions, *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984) and *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994) to support their contention that foreign status must be determined at the time the suit is filed. Both cases establish that FSIA immunity can apply to entities that became entitled to foreign sovereign protection after the alleged wrongdoing.

Wolf, 739 F.2d at 1460; *Straub*, 38 F.3d at 451. Neither case, however, addresses the issue before the Court of whether the FSIA applies when foreign sovereign status which existed at the time of the alleged wrongdoing is subsequently lost.

Based on the foregoing, the Court finds that the Dead Sea Defendants can be entitled to FSIA foreign state status if it is determined that they met the FSIA foreign state requirements at the time the alleged wrongdoing occurred.

2. *Majority Ownership by the State of Israel*

Defendants contend that Dead Sea and BCL qualify as agencies or instrumentalities of the State of Israel because the State of Israel held a majority ownership interest in both Dead Sea and BCL. During the time period in question, the State of Israel did not directly own either Dead Sea or BCL. At all relevant times, the chain of ownership between the State of Israel and the Dead Sea Defendants included intermediary corporations. (See Appendix to Memo. of Law of Third Party Defendants Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited in Opposition to Plaintiff's Motion to Remand ("Dead Sea Appendix"), Exh. B.) For example, from 1970 to 1975, the State of Israel owned 99% of an entity named Dead Sea Works which in turn owned 99.9% of Dead Sea. Dead Sea owned 50% of BCL and Dead Sea Works owned 25% of BCL. (Dead Sea Appendix, Exh. B.) After 1975, another entity was added to the chain of ownership when the State of Israel conveyed its ownership of Dead Sea Works to Israel Chemicals Ltd., an Israeli corporation wholly owned by the State of Israel. (Decl. of Noah Ehrlich dated December 18, 1997, at ¶ 12, at Dead Sea Appendix A.) Any ownership interest of Dead Sea and BCL claimed by the State of Israel was completely indirect at all relevant times.

The Court must determine if the indirect ownership is sufficient to meet the requirements of § 1603(b). The specific issue is whether indirect ownership through a subsidiary

entitles an entity to be considered an agency or instrumentality of a foreign state.

Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995), is the most recent Ninth Circuit decision which discusses the requirements of agency or instrumentality status. While the case is not entirely on point, it is deserving of a lengthy examination.

In *Gates*, the plaintiffs were employees who were terminated when their employer closed its business. *Gates*, 54 F.3d at 1459. They brought an action against several companies including Fletcher's Fresh Food ("FFF"), their employer's parent company, and Alberta Pork Products, FFF's parent company. *Id.* Alberta Pork and FFF moved to dismiss for lack of subject matter jurisdiction pursuant to the FSIA. *Id.* The district court assumed that Alberta Pork and FFF were foreign states under the FSIA, and denied the motion to dismiss upon concluding that FFP and Alberta Pork were not immune from the court's jurisdiction because their actions fell under the commercial activity exception to FSIA immunity. *Id.* Alberta Port and FFF appealed. *Id.*

On appeal, the Ninth Circuit addressed whether Albera Pork and FFF qualified as foreign states under § 1603(b)(2). *Id.* at 1459-60. Noting that the legislative history of the FSIA suggests that "Congress intended the terms "organ" and "agency or instrumentality" to be read broadly[,]" the court concluded that Alberta Pork was an agency or instrumentality of the Province of Alberta by virtue of it being an organ of a foreign state. *Id.* at 1460-61.

The Ninth Circuit then considered the status of FFF under § 1603(b)(2). It noted that FFF, "an ordinary pork processing plant, [could not] be considered an 'organ' of the Province of Alberta [,]" so it looked to see if a majority of the shares of FFF were owned by a foreign state. *Id.* at 1461-62. It concluded that because FFF was wholly owned by Alberta

Pork, an organ of the Province of Alberta, a majority of FFF shares were not owned by a foreign state as is required by the statute. *Id.* at 1462. The court went on to say,

> As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state . . . or has a majority of its shares owned by the foreign state[.]" *Id.*

The court concluded that FFF did not have status as an agency or instrumentality because it was not an organ of a foreign state nor was it majority-owned by a foreign state. *Id.* at 1462-63.

In a later decision, *Corporacion Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996), the Ninth Circuit reiterated its findings in *Gates*. The court stated that "the ownership test of § 1603(b)(2) applie[s] only to the first tier of ownership: an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603(b)(2)." *Corporacion Mexicana*, 89 F.3d at 655 (citation omitted).

The facts in the instant case differ from those in *Gates* as this Court is not confronted with a subsidiary of an organ of a foreign state claiming foreign state status. The issue here is indirect ownership by the State of Israel through a corporate chain. *Gates* and *Corporacion Mexicana* nevertheless provide substantial guidance.

In *Gates*, the Ninth Circuit sought to limit the potential immunity offered to foreign states to those agencies or

instrumentalities that have a direct relationship with the foreign state. *Gates*, 54 F.3d at 1462. It pointed out that Congress "could easily have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or political subdivision[,]" but did not. *Id.* The Ninth Circuit was careful not to put "words in Congress' mouth" and found that a contrary reading of the statute could expand immunity far beyond what Congress intended. *Id.*

The language in *Gates* clearly encompasses both organ and majority shareholder status. *See Gates*, 54 F.3d at 1462. The Ninth Circuit indicated that including entities that are owned by an agency or instrumentality would expand potential immunity considerably because it would provide immunity to every subsidiary in a corporate chain. "So long as the first corporation is an organ of the foreign state . . . *or has a majority of its shares owned by the foreign state*" *Id.* (emphasis added) (footnote omitted). Additionally, the Ninth Circuit's reference in *Corporacion Mexicana* that the ownership test of § 1603(b)(2) applies only to the first tier of ownership is compelling. *Corporacion Mexicana*, 89 F.3d at 655. Had the Ninth Circuit intended to limit the ownership test of § 1603(b)(2) to organ situations, it would have specifically limited its holdings.

The Seventh Circuit, in *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996), however, did address the issue now before this Court, and found the Ninth Circuit's opinion in *Gates* unpersuasive. The plaintiffs in that case sued the airline, American Eagle, its parent company AMR and Avions de Transport Regional, G.I.E. ("ATR"), the aircraft manufacturer, for wrongful death as a result of the crash of American Eagle Flight 4184. *Id.* at 935. ATR was indirectly owned by the French and Italian governments through two European commercial aerospace companies. *Id.* at 935. ATR was indirectly owned by the French and Italian

governments through two European commercial aerospace companies. *Id.* The shares of the French parent company, SNIA, were 62.15% owned directly by the French government. *Id.* Alenia, the Italian parent company, was 62.14% owned by the Italian Instituto Per La Reconstruzone Industriale ("IRI"). IRI was a holding company wholly owned by the Italian government. *Id.* at 936. Through these intermediaries, France and Italy retained nearly 65% of ATR. *Id.*

The Seventh Circuit disagreed with the Ninth Circuit's discussion of § 1603(b)(2) in *Gates*, and found that "[a]lthough France and Italy controlled ATR through intervening entities, the language and legislative history consistent with the language of the FSIA demonstrate that ATR is the type of corporation included within the statutory definition of foreign state." *Id.* at 941 (internal quotations omitted). In *Gates*, the Ninth Circuit found that the use of the word "includes" in 28 U.S.C. § 1603(a) limits the definition of "foreign state". *Gates*, 54 F.3d at 1462. It stated, "the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality." *Id.* The Seventh Circuit, however, found that the use of the word "includes" shows Congress' intent to broadly define "foreign state." *Air Crash*, 96 F.3d at 940. The Seventh Circuit reasoned that the entirety of the FSIA indicates that "if a foreign state as defined in § 1603(a) includes an agency or instrumentality of a foreign state, then a corporation that is majority-owned by a foreign state includes a corporation majority owned by an agency or instrumentality of a foreign state." *Id.* (citation and internal quotations omitted). This decision directly contradicts the Ninth Circuit's reasoning and holding in *Gates*.

In *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 688 (S.D.N.Y. 1996), the court discussed both the Ninth and Seventh Circuit's interpretation of § 1603(b)(2), and found that

"[n]either the Ninth nor the Seventh Circuits' attempt to explain away the inconsistency [in the section] is dispositive." The court averred that Congress' intentions mut be inferred from other sources and not from the language of the text. *Id.* The court discussed the fact that Congress rejected in the FSIA the "separate entity rule" for foreign corporations owned by foreign states which is the prevailing international rule. *Id.* The separate entity rule presumes that entities with separate legal personalities do not have sovereign status. *Id.* The FSIA reversed this presumption and Congress expressly gave corporations owned by foreign states immunity, subject to the commercial activity exception. *Id.* The court reasoned that because Congress was unambiguous in its departure from the prevailing international rule, and because of the serious consequences of a further extension of the FSIA to include corporations owned by agencies and instrumentalities, Congress would have been just as explicit in stating its intention that such entities fall under FSIA if it so intended. *Id.* at 689-90. The court found that a corporation whose shares are owned by an agency or instrumentality of a foreign state is not a foreign state under the FSIA. *Id.* at 690.

While there are cases in the Ninth Circuit where the court has allowed a corporation that is indirectly owned by a foreign state to maintain foreign state status, there was no reference to the issue now before this Court. In fact, the cases came to the court with a presumption of foreign state status, and the court was requested to decide other issues. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); *Straub v A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). Furthermore, each of these cases was decided prior to the Ninth Circuit's decision in *Gates*.

Based on the foregoing, the Court finds that Israel's indirect ownership of Dead Sea and BCL through several intermediary corporations does not qualify Dead Sea and BCL as agencies or instrumentalities of a foreign state pursuant to 28 U.S.C.

§ 1603(b)(2). Dead Sea and BCL are not entities whose majority of shares or other ownership interest are owned by a foreign state.

3. *Organs of the State of Israel*

Dead Sea and BCL also argue that they have foreign state status because they are organs of the State of Israel. They allege that courts look to two categories when deciding organ status: (i) whether the entity advanced the interests of the foreign sovereign; and (ii) whether the foreign sovereign supervised and/or exercised control over the entity so as t circumscribe the entity's ability to act independently." (Dead Sea and BCL's Opp. at 18.) They contend that their relationship with the State of Israel encompasses both of these factors.

As mentioned earlier, in *Gates* the Ninth Circuit determined that Alberta Pork, the parent corporation, was an organ of the Province of Alberta. Alberta Pork was a Canadian corporation established pursuant to the Alberta Marketing of Agricultural Products Act to provide for the effective marketing and promotion of hogs produced in the Province of Alberta. *Gates*, 54 F.3d at 1459. Alberta Pork served as the sole marketing agent through which hogs raised in Alberta were sold. *Id.* Hog producers were required to sell their hogs to Alberta Pork which in turn sold the hogs to pork producers and remitted the proceeds to the producers. *Id.*

The Ninth Circuit determined that Alberta Pork was an organ not by applying a rigid test, but by analyzing the characteristics of the relationship between Alberta Pork and the Province of Alberta. Under Alberta law, producers of an agricultural product could apply to the Alberta Agricultural Products Marketing Council ("Council") for approval to establish a marketing board. *Gates*, 54 F.3d at 1460. The hog producers in Alberta submitted a plan to the Council to create

a marketing board for their industry. *Id.* It was approved, and Alberta Port was formed. *Id.*

The Council did not exercise day-to-day control over the marketing boards like Alberta Pork, but it played a supervisory role. *Id.* Once a marketing board was established, it could "act only in a manner and on the subjects that the Council has previously authorized." *Id.* at 1461. For example, when Alberta Pork wanted to buy FFF, the Council had to issue a regulation approving the acquisition. *Id.*

The Council could also require a board to provide it with all of its records, ask a board to amend or repeal its regulations, and amend or repeal the board's regulations itself if the board had not done so within 45 days. *Id.* A board could not issue regulations without the approval of the Council, and if the regulations conflicted with the Council's regulations, the Council's regulations prevailed. *Id.* If a producer was not satisfied with a decision of a board, it could appeal to an appellate body appointed by the Minister.[1] *Id.* Furthermore, the members of a board were granted immunity for their acts performed while carrying out their duties of the board.[2] *Id.* The court concluded that because Alberta Pork advanced the interest of the Province of Alberta in marketing hogs, and because the laws and regulations of the Province narrowly circumscribed Alberta Port's ability to act independently, Alberta Pork squarely fit within the definition of an organ. *Id.*

In *Corporation Mexicana*, the Ninth Circuit found that Pemex-Refining was an organ of the government of Mexico. *Corporacion Mexicana*, 89 F.3d at 655. Pemex-Refining was created by a presidential decree to restructure Pemex-

[1] The court found this significant, and stated that based on this characteristic a board resembled an administrative agency. *Id.*

[2] The court noted that immunity was normally only "afforded to government actors." *Id.*

Refining's parent company. *Id.* at 654. Pemex-Refining was responsible for the refining, manufacturing, and distributing of petroleum based products in Mexico. *Id.*

In finding that Pemex-Refining was an organ of the government of Mexico, the Ninth Circuit relied on the district court's analysis which explained that Pemex-Refining:

> is an integral part of the United Mexican States. Pemex[-Refining] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it is entirely owned by the Mexican Government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property. Thus Pemex[-Refining] is a subdivision of the United Mexican States and therefore qualifies for foreign sovereign immunity under FSIA.

Id. at 655. The court reasoned that compared to Alberta Pork, Pemex-Refining "is much more of an 'organ' of the government of Mexico than Alberta Pork is of the province of Alberta." *Id.*

The Ninth Circuit has not provided a clear test to determine organ status, but its decisions indicate characteristics that make an entity an organ. Characteristics that supported the Ninth Circuit's finding of organ status in both *Gates* and *Corporation Mexicana* include: (1) the entity was created by the government; (2) the entity served an important government purpose; (3) the entity represented the interests of the government; (4) the entity was charged with exclusive responsibility;[3] (5) the government exercised a supervisory role

[3] In Gates, Alberta Pork was the only pork board, and in *Corporacion Mexicana*, Pemex-Refining was the only body that refined and distributed Mexican petroleum resources.

over the entity; and (5) the government exercised a supervisory role over the entity; and (6) that the entity's ability to act independently was circumscribed by the government. The court also looked at whether the entity employed only government employees, whether the entity acted as an administrative agency, and whether the employees were granted governmental immunity. Not all of these factors need to be present to maintain organ status, however, the entity should at least appear to act in concert with the foreign government at some level.[4]

Defendants support their argument that Dead Sea and BCL maintain organ status by providing the court with substantial information regarding Dead Sea's and BCL's relationship with the State of Israel. Defendants argue that they advanced vital national interests of the State of Israel because they developed and commercially exploited Israel's natural resources. The minerals extracted from the Dead Sea by Defendants were owned by the State of Israel. (Dead Sea Appendix, Exh. E at E001.) Defendants show that they operated under an exclusive

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[4] In *Intercontinental Dictionary, Series v. De Gruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993), the district court discussed the organ status of Australian National University and focused on the fact that the University furthered the academic interests of national importance, that salaries of its employees were paid by the Australian government, that the University was treated like an agency in other Australian legislation. In *Supra Medical Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Penn. 1997), the district court, citing *Corporacion Mexicana*, indicated that to determine organ status a court should consider "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the country; and (5) how the entity is treated under foreign state law." These cases demonstrate that a hard and fast rule is not applied. Instead the court looks at the relationship between the entity and the foreign government and determines on an ad hoc basis whether the relationship is sufficient to find organ status.

statutory concession and subconcession granted by the Israeli legislature to mine the Dead Sea and to market and sel the minerals and their compounds. (Dead Sea Appendix, Exh. E, § 2 and Exh. F, § 2.) The State of Israel was paid a royalty for the extracted minerals. (Dead Sea Appendix, Exh. E., § 15 and Exh. F., § 17.) The Dead Sea Defendants contend that the "economic exploitation of these natural resources is vital to the national interests of the State of Israel[.]" (Dead Sea and BCL Opp., at 19.)

Defendants argue that the exploitation of the State's natural resources is analogous to the activities of Pemex-Refining, the entity discussed in *Corporacion Mexicana*. As discussed above, Pemex-Refining was an entity created by the Mexican government for the specific purpose of refining and distributing oil and gas. *Corporacion Mexicana*, 89 F.3d at 655. While the activity may be similar, the position that Pemex-Refining held in relation to the Mexican government was much closer than the position that Dead Sea and BCL hold in relation to the State of Israel. Dead Sea and BCL are not controlled entirely by government appointees (Dead Sea Appendix, Exh. G., §§ 37, 48), do not employ only public servants (Ehrlich Depo., at 125:21-25 at Dead Sea Appendix, Exh. TT), and are not entirely owned by the State of Israel (Dead Sea Appendix, Exh. A, §§ 9-16).

Defendants also contend that the State of Israel controlled, regulated and supervised Dead Sea and BCL's activities. They explain that the ability of the State to control Defendants was derived from three sources. First, they point out that the State's indirect ownership of the companies provided Israel with the ability to control the Articles of Association, boards of directors and officers of each corporation. (Dead Sea Appendix, Exhs. C and D).

Second, they indicate that the concession and subconcession enactments provided Israel with various rights, including the right to terminate the concession. (Dead Sea Appendix, Exh

E, § 23(b)). The Dead Sea Defendants contend that this right provided control as "[t]ermination of the concession would deprive [Dead Sea and BCL] of their essential raw materials and thus devastate their business purposes, objective and affairs." (Dead Sea Opp., at 22.)

The Dead Sea Defendants also identify the Israeli Government Companies Law as a source of Israel's control over the entities. Dead Sea and BCL were purportedly subject to the Government Companies Law because they were indirectly owned by the State of Israel. (Dead Sea Opp., at 22.) Under the Government Companies Law, their operations and management were subject to different forms of government control, including the right to approve or disapprove certain decisions made by a government company's Board of Directors. (Dead Sea Appendix, Exh. G, § 11.)

The Dead Sea Defendants contend that the State of Israel regularly exercised these powers. For example, the government regularly appointed government employees to serve on the Boards of Directors of Dead Sea and BCL. (Dead Sea Appendix, Exh. H.) The government appointed other government employees to observe meetings held by the Boards of Directors and its committees. (Dead Sea Appendix, Exh. K.) The government required that the companies freeze salaries and wages. (Dead Sea Appendix, Exh. W.) Based upon this information, Defendants contend that throughout the relevant period, Dead Sea and BCL were organs of the State of Israel within the meaning of the FSIA.

The Court does not dispute that the Dead Sea Defendants and the State of Israel maintained a significant relationship. The Court, however, is not convinced that their relationship with the State of Israel is sufficient to raise them to the status of organs of a foreign state.

Dead Sea and BCL are commercial mining operations concerned with production, marketing and profit. (Dead Sea

Appendix, Exh. A, Ehrlich Decl., at ¶ 7-8). The control maintained by the government was derived mainly from the government's indirect ownership of the entities. Any other entity in which the government owned a majority interest would be subject to the same control. (See Dead Sea Appendix, Exh. G.) Unlike the situations in *Gates* and *Corporacion Mexicana*, the government's control is not derived from the need to play an active supervisory role over a government created entity. *See Gates*, 54 F.3d at 1460-61; *Corporacion Mexicana*, 89 F.3d at 655. Moreover, the entities are not staffed solely with government employees (Dead Sea Appendix, Exh. TT, Ehrlich Depo. at 125:21-25) and are not treated as agencies under Israeli law.

The Court finds that unlike Alberta Pork and Pemex-Refining, Defendants were independent corporations pursuing a purpose that benefitted the government of Israel, but were not created by the government to fulfill a government mission. Consequently, Dead Sea and BCL are not organs of the State of Israel, and cannot be granted foreign state status under the FSIA.

Based on the foregoing, the Court finds that neither Dead Sea nor BCL qualify as an agency or instrumentality of a foreign state under the FSIA. Removal of the action by the Dead Sea Defendants under 28 U.S.C. § 1441(d) was therefore not proper.[5] There is, however, the Supplemental Grounds for Removal filed by Defendant Dole Food Company which may provide grounds for removal. Resolution of Plaintiffs' motion to remand will therefore depend on whether the supplemental grounds of removal were proper.

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[5] Because the Court finds that neither Dead Sea nor BCL are foreign states under the FSIA and could therefore not remove the action under 28 U.S.C. § 1441(d), it is not necessary to reach Plaintiffs' argument that Dead Sea and BCL were fraudulently joined in the action.

III. PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO SUPPLEMENTAL GROUNDS FOR REMOVAL

On November 3, 1997, Defendant Dole Food Company, Inc. filed a timely Supplemental Notice of Removal which was consented to by the other defendants. The Supplemental Notice of Removal asserts that federal question jurisdiction and diversity jurisdiction provide supplemental bases for removal.

Defendants assert that the following sources of federal question jurisdiction exist: 1) foreign relations implications; 2) Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et. seq.* ("FIFRA") preemption; and 3) violation of a federal court injunction. In addition, Defendants contend that the question of dismissal based on forum non conveniens and comity of the nations grounds is a uniquely federal determination that must be addressed by a federal court.

Defendants assert that diversity jurisdiction is also present. They allege that all plaintiffs are citizens or subjects of a foreign state and that all defendants over whom the court has personal jurisdiction are citizens of a state of the United States.

As discussed below, the Court finds that removal of the action was proper. Federal question jurisdiction exists because Plaintiffs' action implicates foreign relations. Accordingly, the Court need not reach whether removal was proper under any of the other alleged grounds for removal.

A. *Federal Question Jurisdiction Through Foreign Relations Implications*

In its Supplemental Notice of Removal, Defendant Dole Food Company, Inc. asserts that federal question jurisdiction exists in the present action because Plaintiffs' allegations and requests for relief implicate foreign relations between the United States and the home countries of the Plaintiffs. Plaintiffs contend that their purely state law claims do not

implicate United States foreign relations so as to create federal question jurisdiction.

In evaluating whether the Court has jurisdiction to hear the instant action, the Court must examine the "well-pleaded complaint" to see whether the Complaint relies on any doctrine of federal law. *Republic of the Philippines v. Marcos*, 806 F.2d 344, 352, 354 (2nd Cir. 1986). As established by the Supreme Court, lower federal courts have "jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 27-28 (1983). The Court must therefore examine Plaintiffs' complaint to see if the action arises under federal law.

The federal courts have fashioned a federal common law to address issues of international relations. *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir. 1992). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), the Supreme Court stated that issues involving "our relationships with other members of the international community must be treated exclusively as an aspect of federal law." Accordingly, federal jurisdiction exists even though a plaintiff pleads only state law causes of action where resolution of the plaintiff's claims require determinations that will directly and significantly affect United States foreign relations. *Marcos*, 806 F.2d at 354.

In *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), the Fifth Circuit found the plaintiffs' state law causes of action implicated foreign relations sufficiently to raise substantial questions of federal common law. *Id.* at 542-43. In *Torres*, Peruvian plaintiffs asserted only state law causes of action in Texas state court for injuries caused by sulfur dioxide

emissions from the defendants' copper smelting and refining operations in Peru. *Id.* at 541. The defendants removed the action to federal court and the plaintiffs moved to remand. *Id.* at 541-42. The Fifth Circuit found that the district court had federal question jurisdiction to hear the action as the plaintiffs' complaint implicated important foreign policy concerns. *Id.* at 542-43. The action involved injuries to foreign citizens on foreign soil. *Id.* at 541. The case concerned the mining industry of Peru which constituted a significant portion of Peru's export income. *Id.* at 543. The Peruvian government had protested the lawsuit. *Id.* at 542.

As in *Torres*, the instant action implicates foreign policy concerns. Plaintiffs' injuries allegedly arose out of their exposure to DBCP used in the agricultural industry in Plaintiffs' home countries. (Amended Complaint, at ¶¶ 34 & 36.) Plaintiffs were allegedly exposed to DBCP while working in the commercial cultivation of bananas for sale by American corporations in the United States. (Amended Complaint, at ¶ 34.) The action involves injuries to foreign citizens on foreign soil. (Amended Complaint, at ¶ 34). Although the United States had banned use of DBCP in 1979, Defendants allegedly continued to export the product. (Amended Complaint, at ¶ 45.) Plaintiffs claim that defendants who supplied and operated commercial cultivation enterprises in Plaintiffs' home countries failed to inform and protect the workers using DBCP. (Amended Complaint, at ¶¶ 36, 56, 60-61, 74.) It is conceivable that such situations put a country in the position where it must balance the need to protect its workers with the need to encourage economic development. Moreover, suits against companies that invest in foreign countries can raise important economic questions for those countries.

In light of the allegations raised in Plaintiffs' Amended Complaint, the Court finds that this action raises issues of federal common law by implicating important foreign relations concerns. Accordingly, the Court finds that it has federal

question jurisdiction over the instant action and that removal of the action was proper.[6] Plaintiffs' Motion for remand are therefore DENIED.

IV. CERTAIN DEFENDANTS' MOTION TO DISMISS AND FOR INJUNCTIVE RELIEF

All of the Defendants except for Defendants AMVAC Chemical Corporation, Del Monte Fresh Produce Hawaii, Inc., and Fresh Del Monte, N.V. move to dismiss the instant action under the doctrine of forum non conveniens and under principles of international comity.[7] Defendants also seek a

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[6] By Final Judgment filed October 27, 1995, Judge Lake of the United States District Court for the Southern District of Texas permanently enjoined the plaintiffs and persons acting in concert with the plaintiffs, such as attorneys who appeared in the cases before him, from commencing or causing to be commenced in any court in the United States any action involving DBCP-related claims. (Certain Defendants' Motion to Dismiss and for Injunctive Relief, Exh. 6.) Defendants indicate that at least one of the plaintiffs in the Complaint filed on October 3, 1997, Melgar Olimpio Moreno, was a plaintiff in one of the actions before Judge Lake. At the hearing on April 6, 1998, attorney Scott Hendler for Plaintiffs stated that the inclusion of the plaintiff identified by Defendants as being covered by the injunction was a clerical error. On March 3, 1998, Plaintiffs filed an Amended Complaint which did not include Melgar Olimpio Moreno as a plaintiff. Accordingly, the Court in this instance does not find it necessary to enforce the injunction established by Judge Lake.

[7] Generally, the doctrine of forum non conveniens cannot apply if there is an absence of jurisdiction. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Under this principle, the Court would ordinarily be required to address the motions to dismiss for lack of personal jurisdiction filed by Standard Fruit Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Standard Fruit and Steamship Company, Dole Fresh Fruit International, Inc., and Dole Fresh Fruit International, Limited (collectively, "Standard Fruit and Dole entities") before addressing the motion to dismiss on forum non conveniens grounds. There are, however, rare cases in which a district court can resolve the forum non conveniens issues prior to resolving

mandatory injunction against Plaintiffs enjoining them from filing further DBCP related suits.

A. *Plaintiffs' Motion to Strike*

On April 3, 1998, Plaintiffs filed a Motion to Strike six supplemental affidavits submitted with Defendants' Reply Memorandum in Support of Certain Defendants' Motion to Dismiss and for Injunctive Relief. Plaintiffs contend that the supplemental affidavits of foreign law experts should be stricken because Defendants have raised issues in their reply brief that were not addressed in their motion to dismiss. The Court does not agree that Defendants' reply brief raised issues that were not addressed in their motion to dismiss. Furthermore, the Court provided Plaintiffs the opportunity to respond to the matters raised in Defendants' reply brief by allowing both parties to file supplemental briefs on the foreign law issues. (Minute Order filed April 7, 1998.) Plaintiffs did file a supplemental brief on April 27, 1998.

Plaintiffs also argue that Defendants should not be allowed to submit the supplemental affidavits because Defendants had

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personal jurisdiction issues. See *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1351 n.57 (S.D. Tex. 1995); *Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 827 n.8 (5th Cir. 1986). "Where . . . the arguments in favor of dismissal are strong, and the jurisdictional objections are inapposite to all but a few parties, the District Court can proceed directly to the resolution of the forum non conveniens issue." *Syndicate 420*, 796 F.2d at 827 n.8. The Court finds that in the instant action, it can proceed to address the forum non conveniens issue prior to addressing the motions to dismiss for lack of personal jurisdiction. Only six of the twenty defendants have moved to dismiss for lack of personal jurisdiction. Moreover, the Standard Fruit and Dole entities have stipulated to delay consideration of the motions to dismiss for lack of personal jurisdiction until after the Court has heard the motion to dismiss on forum non conveniens grounds. (Stipulation to Continue Motions to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process filed April 2, 1998.)

successfully opposed Plaintiffs' request to depose Defendants' foreign law experts. The lack of Plaintiffs' opportunity to depose Defendants' foreign law experts does not make the affidavits of Defendants' foreign law experts unavailable for the Court to consider. Furthermore, Plaintiffs had an opportunity to submit their own evidence relating to the foreign law issues in response to Defendants' motion to dismiss.

Based on the foregoing, the Court DENIES Plaintiffs' motion to strike. The Court will consider the supplemental affidavits submitted with Defendants' reply brief, along with the additional information the parties supplied in their supplemental briefs relating to Plaintiffs' motion to strike.

B. *Forum Non Conveniens*

Under the common-law doctrine of forum non conveniens, a district court may decline to exercise its jurisdiction over a case when a foreign tribunal can more appropriately conduct the litigation. *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 945 (1st Cir. 1991). If the Court decides that the case should more appropriately be tried in a foreign forum, it may dismiss the case. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983).

Determination of whether forum non conveniens dismissal is warranted is committed to the sound discretion of the trial court; it may be reversed only when there has been a clear abuse of discretion. *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1448-49 (9th Cir. 1990) (citations omitted).

A party moving for forum non conveniens dismissal has the burden of demonstrating two elements: 1) the existence of an adequate alternative forum; and 2) that the balance of relevant private and public interest factors favor dismissal. *Creative Technology, Ltd. v. Aztech System PTE, Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). To meet this burden, Defendants must provide sufficient information to enable the Court to balance the

parties' interests. *Contact Lumber*, 918 F.2d at 1449. If Plaintiffs, however, can demonstrate that choice of law requires retaining the case, the motion to dismiss should be denied. *Id.*

Where the plaintiff is non-foreign, there is a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors weigh in favor of trial in the alternative forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-46 (1981). This is because "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Id.* When the plaintiff is foreign, however, this assumption is less reasonable and the plaintiff's choice is afforded less deference. *Id.* In such case, the showing required to obtain dismissal is reduced. *See Empresa Lineas Martimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 371 (5th Cir. 1992).

1. *Adequate Alternative Forum*

The first step in forum non conveniens analysis is to determine whether an adequate alternative forum exists. *Creative Technology*, 61 F.3d at 701. In the instant case, Plaintiffs are citizens of the countries of Costa Rica, Ecuador, Guatemala, and Panama. (Amended Complaint, at ¶ 1.) Evaluation of Defendants' forum non conveniens argument will thus require evaluation of whether an adequate alternative forum is provided in each of these four countries. Defendants must establish that an adequate and available forum exists for all the plaintiffs in the case. *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1164 (5th Cir. 1987), *vacated on other grounds, Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989).

a. *Availability of Alternative Forums*

An alternative forum is generally deemed to exist if the defendant is "amenable to process" in the alternative forum. *Piper Aircraft*, 454 U.S. at 255 n.22. In rare circumstances,

however, where the remedy offered by the alternative forum is clearly unsatisfactory, the requirement of an adequate alternative forum may not be satisfied with the defendant being amenable to process. *Creative Technology*, 61 F.3d at 701. For example, dismissal under the doctrine of forum non conveniens would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. *Id.* (citing *Piper Aircraft*, 454 U.S. at 255 n.22.)

To support their claim that adequate alternative forums exist for Plaintiffs' claims, Defendants cite previous DBCP cases which held that Guatemala, Costa Rica, Ecuador, and Panama exist as adequate alternative forums. *See e.g. Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995); *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Flor. 187), *rev'd on other grounds*, 883 F.2d 1553 (11th Cir. 1989); *Valentin Valdez-C v. Coahoma Chemical Co., Inc.*, Civil No. 1:96cv362GR, S.D. Miss. 1997 (attached as Exh. 1 to Certain Defendants' Motion to Dismiss and for Injunctive Relief ("Def. Motion to Dismiss")); *Aguilar v. Dow Chemical Co.*, Case No. 86-4753 JGD (TX), C.D. Calif. (9186) (attached as Exh. 4 to Def. Motion to Dismiss).

Plaintiffs contest the availability of adequate alternative forums in Plaintiffs' home countries on the basis that the foreign courts lack jurisdiction over Plaintiffs' claims and over Defendants. In support of these contentions, Plaintiffs submit the Declaration of Professor Alejandro M. Garro of the Columbia School of Law who states that "if these foreign plaintiffs were to seek redress in their home countries after having chosen to sue at the place of defendants' domicile, the courts of those countries will refuse to hear their claims." (March 16, 1998 Declaration of Professor Alejandro M. Garro attached as Exh. 2(A) to Plaintiffs' Response to Defendants' Motion to Dismiss ("Plaintiff. Response to Def. Motion to Dismiss") ("3/16/98 Garro Decl."), at ¶ 7.) The Court will

address the availability of the courts of each of the Plaintiffs' home countries.

i. *Panama*

Defendants submit the affidavits of Dr. Jorge Fabrega, an Alternate Justice of the Supreme Court of Panama. (*See* Affidavits of Dr. Jorge Fabrega at Panama II, Exh. A & B") attached to Declaration of Boza S. Morag dated March 25, 1998 submitted with Reply Memo in Support of Certain Defendants' Motion to Dismiss and for Injunctive Relief ("3/25/98 Morag Decl.").) Dr. Fabrega states that Plaintiffs' claims may be heard and resolved in the Panamanian courts. (Fabrega Aff. At Panama II, Exh. A ¶ 3.) He explains that under Article 258 of the Code of Civil Procedure of Panama, a Panamanian court can have jurisdiction over an action on the basis that the alleged injury occurred within the jurisdiction, notwithstanding the non-residence of the Defendants in the jurisdiction. (Fabrega Aff. At Panama II, Exh. A ¶ 4; Exh. B ¶ 20.) Moreover, a Panamanian court may exercise jurisdiction over a defendant that would ordinarily not be amenable to jurisdiction in Panama if the defendant voluntarily consents to the jurisdiction of Panama. (Fabrega Aff. At Panama II, Exh. A ¶ 5.)

Plaintiffs submit the declarations of Professor Garro in support of their contention that the courts of Panama would not have jurisdiction to hear Plaintiffs' claims. Professor Garro states that if a tort action were to be brought by a Panamanian national against a defendant domiciled in the United States, the Panamanian courts would refuse to exercise jurisdiction over the case if a court in the United States referred the parties to Panama. (3/16/98 Garro Decl., at ¶ 17.) Professor Garro refers to a September 20, 1995 decision of the Second Civil Circuit Court of the First Judicial Circuit of Panama in which the court declined to take jurisdiction over a tort suit brought against business corporations domiciled in the United States. (3/16/98 Garro Decl., at ¶ 15.) The Panamanian court found

that under Article 254 of the Judicial Code of Panama, business corporations ought to be sued before the courts where their main place of business is located. (3/16/98 Garro Decl., at ¶ 15.) This evidence does not convince the Court that a Panamanian court would not have jurisdiction to hear Plaintiffs' claims. As pointed out by Defendants, the Panamanian courts could have jurisdiction over Plaintiffs' claims on the basis that the alleged injuries occurred in Panama and through Defendants' voluntary consent.

Plaintiffs further argue that the Panamanian courts would disregard any attempts to create jurisdiction by stipulation of the parties. They indicate that since the dismissal of the *Delgado* action which involved claims filed by banana workers allegedly exposed to DBCP, the Panamanian courts have declined to hear the plaintiffs' action refiled in Panama. (Exh. 4 to Plaintiff. Response to Def. Motion to Dismiss.)

Defendants respond by pointing out explanations for the dismissal of the DBCP action in Panama. According to Dr. Fabrega, the plaintiffs wrongfully filed suit in Panama Province rather than the provinces in which the plaintiffs were injured. (Fabrega Aff. At Panama II, Exh. B ¶ 10-11.) Moreover, while jurisdiction would have been proper if the defendants consented to jurisdiction, the Panamanian court was not informed of the defendants' agreement to consent to jurisdiction in Panama. (Fabrega Aff. at Panama II, Exh. B ¶ 12.)

The Court finds that the evidence before the Court indicates that the Panamanian courts could constitute an available alternative forum to hear Plaintiffs' claims.

ii. *Costa Rica*

Defendants submit the June 12, 1995 Affidavit of Dr. Atilio Vincenzi, an attorney in Costa Rica and a former Supreme Court Justice of Costa Rica. (*See* Affidavit of Dr. Atilio Vincenzi at Costa Rica II, Exh. D attached to 3/25/98 Morag

Decl. ("Vincenzi Aff. at Costa Rica II, Exh. D").) According to Dr. Vincenzi, Costa Rican courts would have jurisdiction to hear an action based on the sale of produces in the country notwithstanding the fact that the defendants are foreign entities. (Vincenzi Aff. at Costa Rica II, Exh. D ¶ 5.) The nationality of the defendants would not preclude jurisdiction if the alleged injuries were caused by the use of the products in the country. (Vincenzi Aff. at Costa Rica II, Exh. D ¶ 5-6.) If the alleged injuries occurred in the country, the Costa Rican courts would have jurisdiction to hear the case even if the action was previously dismissed by a United States court. (Vincenzi Aff. at Costa Rica II, Exh. D ¶ 6.)

Plaintiffs submit the declarations of Professor Garro in which he states that Costa Rican courts would refuse to exercise jurisdiction over Plaintiffs' claims if the United States referred the parties to Costa Rica. (3/16/98 Garro Decl., at ¶ 17.) Professor Garro refers to several Costa Rican decisions in which it was found that the Costa Rican courts did not have jurisdiction over tort actions brought against defendants domiciled in the United States. (3/16/98 Garro Decl., at ¶ 16; October 17, 1996 Declaration of Professor Alejandro M. Garro attached as Exh. 2(B) to Plaintiff. Response to Def. Motion to Dismiss ("10/17/96 Garro Decl."), at ¶ 8.) Professor Garro explains that the rulings were based on a Costa Rican court's interpretation that the manufacturing of products abroad does not constitute a wrongful act occurring in Costa Rica and that the court lacks jurisdiction over actions arising out of the manufacturing of goods outside of Costa Rica. (10/17/96 Garro Decl., at ¶ 8.) Professor Garro also refers to the Costa Rican case of *Carlos Luis Abarca Barca v. Shell Oil Co.* In which a Costa Rican court refused to take jurisdiction of a DBCP case dismissed by the District of Texas on forum non conveniens grounds. (10/17/96 Garro Decl., at ¶¶ 6, 8; Costa Rica II, Exh. E attached to 3/25/98 Morag Decl.) Professor Garro explains that the court declined to take jurisdiction because the plaintiffs appeared before the Costa Rican courts

not out of their own will, but out of a decision of a foreign court to dismiss the case on forum non conveniens grounds. (10/17/96 Garro Decl., at ¶ 8.)

Defendants point out that the Supreme Court of Costa Rica has held that the Costa Rican civil courts have jurisdiction to hear DBCP-related claims by Costa Rican citizens against their employers and non-resident DBCP manufacturers. (Declaration of Miguel Blanco Quiros at Costa Rica II, Exh. A Annex B to 3/25/98 Morag Decl. ("Quiros Decl. At Costa Rica II, Exh. A Annex B"), ¶ 11; Exh. 5 to Defendants' Response to Plaintiffs' Motion to Strike.) Defendants also offer an alternative explanation for why the *Abarca* case was dismissed in Costa Rica. Defendants state that the Costa Rican plaintiffs i) express doubt as to the court's jurisdiction; ii) informed the court that the Texas court would reassume jurisdiction if the Costa Rican courts dismissed the action and iii) did not serve the defendants or inform the court that the defendants had agreed to submit to the jurisdiction of Costa Rican courts. (Reply Memo. in Support of Certain Defendants' Motion to Dismiss and for Injunctive Relief, at 5.)

Based on the foregoing, the Court finds that there is sufficient evidence indicating that the courts of Costa Rica constitute an available alternate forum for Plaintiffs' claims.

iii. *Guatemala*

Defendants submit the declarations of Ricardo Sagastume Viduarre, former Chief Justice of the Supreme Court of Justice of Guatemala. (*See* Declarations of Ricardo Sagastume Vidaurre at Guatemala II, Exh. A to 3/25/98 Morag Decl. ("Vidaurre Aff. at Guatemala Ii, Exh. A").) Mr. Vidaurre states that the courts of Guatemala would have jurisdiction to hear a case where the alleged damage occurred in Guatemala because in an action for damages, the court of the place where damages were caused would have jurisdiction over the action. (Vidaurre Aff. at Guatemala II, Exh. A, Annex A ¶¶ 23-24.)

Plaintiffs contend that under a Guatemalan statute which declares the doctrine of forum non conveniens unacceptable and invalid, Guatemalan courts would not have jurisdiction to hear Plaintiffs' claims.[8] (3/16/98) Garro Decl., at ¶¶ 9-14.) Contrary to Plaintiffs' assertions, the Guatemalan statute does not require a Guatemalan court to refuse jurisdiction over a case dismissed on forum non conveniens grounds. Article 3 of the Guatemalan statute expressly provides that if a foreign judge declines to exercise jurisdiction of a case on foreign non conveniens grounds, the (Guatemala II, Exh. C attached to 3/25/98 Morag Decl.) Guatemalan court may as "an exceptional measure to avoid procedural abandonment of the Guatemalan residents and nationals," reassume jurisdiction of the case if certain criteria are met. (Guatemala II, Exh. C to 3/25/98 Morag Decl.) This indicates that a Guatemalan court may assume jurisdiction over a case dismissed in the United States on forum non conveniens grounds.

Plaintiffs point out that a Guatemalan court found that it did not have jurisdiction over a DBCP case dismissed on forum non conveniens grounds. (3/16/98) Garro Decl., at ¶ 13.)

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[8] The Guatemalan statute provides in relevant part:

Article 1

Because it is in violation of the rights that the Political Constitution of the Republic and the judicial order of Guatemala guaranteed to its nationals and residents, the theory called "Forum Non Conveniens" is to prevent the continuation of a lawsuit in the domiciliary courts of the defendants. . . .

Article 3

If having informed the foreign judge about the reach of this law and the same refuses to hear the case submitted to his jurisdiction, as an exceptional measure and to avoid procedural abandonment of the Guatemalan nationals and residents, the national judges can reassume jurisdiction. But in specific cases they will have to observe the following methods. . .

Defendants contend that the dismissal of the DBCP case is not persuasive here as the plaintiffs in that case engineered dismissal in Guatemala by expressing disapproval of the forum non conveniens dismissal and informing the court that dismissal might persuade a United States court to reassert jurisdiction. (Vidaurre Decl. at Guatemala II, Exh. A ¶¶ 5-6.) The evidence before the Court does not indicate that the Guatemalan courts would not assume jurisdiction over Plaintiffs' claims.

Based on the foregoing, the Court finds that there is sufficient evidence that Guatemalan courts could provide an alternative forum for Plaintiffs' claims. There is nothing before the Court which indicates that the courts of Guatemala would not be available to Plaintiffs.

iv. *Ecuador*

Defendants submit the affidavits of Dr. Enrique Ponce y Carbo, a former Justice of the Supreme Court of Ecuador. (*See* Affidavit of Dr. Enrique Ponce y Carbo at Ecuador II, Exh. A attached to 3/25/98 Morag Decl. ("Ponce y Carbo Decl. at Ecuador II, Exh. A"); April 2, 1998 Affidavit of Dr. Enrique Ponce y Carbo at Exh. 10 to Defendants' Response to Plaintiffs' Motion to Strike ("4/2/98 Ponce y Carbo Aff.").) Dr. Ponce y Carbo states that under the Code of Civil Procedure of Ecuador, Ecuadorian courts have jurisdiction over an action if the injury was caused in Ecuador. (Ponce y Carbo Aff. at Ecuador II, Exh. A. ¶ 4.) Where the defendants are not residents in the jurisdiction, an Ecuadorian court would have jurisdiction on the basis that the alleged tort was committed within the jurisdiction. (Ponce y Carbo Decl. at Ecuador II, Exh. A ¶ 4.) Under this principle, Ecuadorian courts could have jurisdiction over a non-resident manufacturer of a product which allegedly caused injuries in Ecuador. (Ponce y Carbo Decl. at Ecuador II, Exh. A ¶ 4.) Moreover, an Ecuadorian court can exercise jurisdiction over a defendant that would not otherwise be amenable to jurisdiction in Ecuador and voluntarily consents to the exercise of the

Ecuadorian court's jurisdiction. (Ponce y Carbo Decl. at Ecuador II, Exh. A ¶ 5.)

Plaintiffs contend that under an Ecuadorian statute enacted in January 1998, Ecuadorian courts would not have jurisdiction over Plaintiffs' claims if this action is dismissed on forum non conveniens grounds. The Ecuadorian statute provides, in relevant part:

> Without prejudice to their literal meaning, articles 27, 28, 29, and 30 of the Code of Civil Procedure shall be interpreted in the sense that in case of concurrent international jurisdiction, the plaintiff may freely choose between bringing suit in Ecuador or in a foreign country . . . If a suit were to be filed outside Ecuador, the national competence and jurisdiction of Ecuadorean courts shall be definitely extinguished.

(3/16/98 Garro Decl., at ¶ 11.)

Defendants respond by pointing out that the legality and retroactive effect of this statute is questionable. They submit the affidavit of Dr. Ponce y Carbo which indicates that the statute is unconstitutional and therefore not effective because the statute was not signed by the President of Ecuador as required by Ecuador's Constitution. (4/2/98 Ponce y Carbo Aff., at ¶¶ 7-16.) Defendants also submit the affidavit of Dr. Rafael Pino Rubira, an attorney in Ecuador. (Affidavit of Dr. Rafael Pino Rubira, attached as Exh. 11 to Defendants' Response to Plaintiffs' Motion to Strike ("Rubira Aff.") Dr. Rubira states that even if the Ecuadorian statute was constitutional, it would not apply to judgments made prior to the January 30, 1998 effective date of the statute. (Rubira Aff., at ¶ 11.) Dr. Rubira states that in 16 of 27 cases filed by shrimp farmers in Ecuador after their cases were dismissed on forum non conveniens grounds, judges in Ecuador assumed jurisdiction over the cases. (Rubira Aff., at ¶¶ 8 & 12.)

Defendants contend that the Ecuadorian statute is not applicable to Plaintiffs' claims as Plaintiffs filed their claims in the United States prior to the passing of the Ecuadorian statute. Defendants argue that the statute would not apply retroactively to Plaintiffs' claims.

The Court finds that the constitutionality and applicability of the Ecuadorian statute to Plaintiffs' claims are not clear given the decisions of several Ecuadorian trial courts and the opinions of Defendants' experts. In light of the uncertainty relating to the statute, the Court finds that it has no basis for concluding that the courts of Ecuador are not available to Plaintiffs' claims.

Based on the foregoing, the Court concludes that there is no basis for finding that the courts of Plaintiffs' home countries are not available for Plaintiffs' claims. In order to ensure the availability of an alternative forum in each of Plaintiffs' home countries, however, the Court will condition dismissal of the action upon 1) Defendants' stipulation to submit to the jurisdiction of the foreign forums involved in this action and to waive all jurisdictional and statute of limitations defenses; and 2) acceptance of jurisdiction by the foreign courts involved in these cases. See Contact Lumber, 918 F.2d at 1450 (dismissal conditioned on a defendant's submission to jurisdiction in a foreign court satisfies the requirement of an alternative forum); *Delgado*, 890 F. Supp. At 1357.

b. *Adequacy of the Alternative Forums*

The key question in determining whether in alternative forum is adequate is whether "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Creative Technology*, 61 F.3d at 701 (quoting *Piper Aircraft*, 454 U.S. at 254). A forum is generally considered adequate if the forum provides a potential avenue for redress; the possibility that the foreign court will

apply law that is less favorable to the plaintiff does not render the forum inadequate. *Id.* At 702-03.

The affidavits of foreign law experts submitted by Defendants indicate that the legal systems of the Plaintiffs' countries meet the adequacy requirement. Defendants summarize the testimony as follows:

- Each country provides its citizens with a right of action for money damages against the manufacturer or supplier of a defective product.
- In each country, a plaintiff may also assert a claim against his employer for injuries sustained while employed.
- In each country, a plaintiff may assert claims for negligence.
- Each country guarantees the right of all parties to a fair trial.
- each country provides a mechanism for consolidation of similar claims.
- Each country provides discovery procedures to gather evidence, to obtain the testimony of witnesses and to compel the production of documents.

(Def. Motion to Dismiss, at 14-15)

Plaintiffs point to three factors that supposedly render the courts of their home countries inadequate: 1) lack of contingency fees and other financial barriers; 2) severely limited discovery and restricted access to means of proof; and 3) delay and other problems.

i. *Lack of Contingency Fees and Other Financial Hardships*

Plaintiffs assert that the unavailability of contingency fee arrangements in their home countries prevents the alternative forums from being deemed adequate.

There is a division in authority on whether the absence of contingency fee arrangements may cause a forum to be deemed inadequate. *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 292-93 (2nd Cir. 1996). The majority of courts regard the absence of contingent fee arrangements to be only one factor to be weighed in determining the balance of convenience after the court determines that an alternative forum is available. *Id.* As the Second Circuit points out, this approach is sensible. "Balancing the plaintiff's financial burdens as one of several relevant factors serves the 'repeatedly emphasized...need to retain flexibility' in the application of the forum non conveniens doctrine. . . . Indeed, to do otherwise would render the financial burden on a plaintiff the 'determinative factor.'" *Id.* at 292 (quoting *Piper Aircraft*, 454 U.S. at 249) (further citation omitted). Most foreign forums do not allow contingency fees, so if a court held the lack of contingent fee arrangements to be determinative, then few foreign forums would be adequate. *Id.*; *see also Piper Aircraft*, 454 U.S. at 252 n.18 ("[U]nlike most foreign jurisdictions, American courts allow contingent attorney's fees[.]").

Based on the above, the Court finds that the lack of contingency fees in Plaintiffs' home countries does not deem the foreign forums inadequate.

Plaintiffs further argue that restrictions on damages in Plaintiffs' home countries render dismissal on forum non conveniens grounds improper. Plaintiffs submit testimony indicating that compensatory damages in Costa Rica and Guatemala would be generally limited to pecuniary losses. (Affidavit of Victor Perez Vargas, attached as Exh. 20 to

Plaintiff. Response to Def. Motion to Dismiss ("Vargas Aff."), at ¶ 17; Affidavit of Francisco Villagran Kramer, attached as Exh. 19 to Plaintiff. Response to Def. Motion to Dismiss ("Kramer Aff."), at ¶ 7). They also assert that in Panama, damages for pain and suffering would be limited to US $3,000. (Affidavit of Gilberto Boutin, attached as Exh. 15 to Plaintiff. Response to Def. Motion to Dismiss ("Routin Aff."), at ¶¶ 1.4.) Plaintiffs argue that these financial hardships and restrictions on damages render forum non conveniens dismissal inappropriate.

"A court may dismiss on forum non conveniens grounds even though the foreign forum does not provide the same range of remedies as are available in the home forum." *Creative Technology*, 61 F.3d at 701-02 (quoting *Ceramic Corp. of America v. Inka Maritime Corp.*, 1 F.3d 947, 949 (9th Cir. 1993)). The prospect of a lower recovery in the alternative forum does not justify refusing to dismiss on forum non conveniens grounds. *Alcoa Steamship Co. Inc. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980). As stated above, Defendants have submitted testimony indicating that each of Plaintiffs' countries provides its citizens with remedies that would address Plaintiffs' alleged injuries. Each country provides its citizens with a right of action for money damages against the manufacturer or supplier of a defective product. (April 5, 1994 Declaration of Miguel Blanco Quiros at the "Costa Rica" exhibit to the December 19, 1997 Affidavit of Burt Ballanfant attached to Def. Motion to Dismiss ("12/19/97 Ballanfant Aff.") ("4/5/94 Quiros Decl."), at ¶ 10; August 17, 1994 Affidavit of Dr. Enrique Ponce y Carbo at the "Ecuador" exhibit to 12/19/97 Ballanfant Aff. ("8/17/94 Ponce y Carbo Aff."), at ¶¶ 12-14; April 4, 1995 Declaration of Ricardo Sagastume Vidaurre attached at the "Guatemala" exhibit to 12/19/97 Ballanfant Aff. ("4/4/95 Vidaurre Decl."), at ¶15; August 31, 1994 Affidavit of Dr. Jorge Fabrega at the "Panama" exhibit to 12/19/97 Ballanfant Aff. ("8/31/94 Fabrega Aff."), at ¶ 13.) In each country, a plaintiff may assert

claims for negligence. (4/5/94 Quiros Decl., at ¶ 10; 8/17/94 Ponce y Carbo Aff., at ¶ 18; 4/4/95 Vidaurre Decl., at ¶ 15; 8/31/94 Fabrega Aff., at ¶ 15.) Plaintiffs will not be left with clearly inadequate or unsatisfactory forums. Accordingly, the Court finds that the alleged restrictions on Plaintiffs' remedies and damages do not render the foreign forums inadequate.

Plaintiffs also contend that they may not be able to enforce damage awards in many instances because Defendants have no assets in the foreign forums. While Plaintiffs do not offer any concrete evidence to support their contention, the issue is an important one. The Court conditions dismissal of this action upon Defendants' agreement to satisfy any final judgment rendered in favor of Plaintiffs by a foreign court. *See Alcoa Steamship Co., Inc.*, 654 F.2d at 159 n.16; *Delgado*, 890 F. Supp. at 1373.

ii. *Limited Discovery*

Plaintiffs contend that limited discovery and restricted access to means of proof in the courts of their countries deem the alternative forums inadequate.

"[T]he unavailability of beneficial litigation procedures similar to those available in the federal district courts" does not render a foreign forum inadequate. *Borden, Inc. v. Meiji Milk Products, Co.*, Ltd., 919 F.2d 822, 829 (2d Cir. 1990) (citation omitted). A country does not need to afford litigants expansive pretrial discovery comparable to those found in the United States. *Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co.*, 896 F. Supp. 1197, 1201 (M.D. Flor. 1995). For example, in *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 768-69 (9th Cir. 1991), the Ninth Circuit held that different pretrial discovery in Japan did not render the Japanese forum inadequate. The Supreme Court has recognized that "discovery is more extensive in American than in foreign courts." *Piper Aircraft*, 454 U.S. at 252 n.18. The forum non conveniens doctrine would be essentially

eliminated if the adequacy of a foreign forum depended on the availability of comparable discovery.

Based on the above, the Court finds that the courts of Plaintiffs' countries should not be deemed inadequate on the basis that they do not permit discovery comparable to that in the United States.

iii. *Delay and Other Differences*

Plaintiffs contend that the Court should not dismiss their claims because delays in Plaintiffs' countries will deny them substantial justice. They assert that the courts of Plaintiffs' countries do not have the adequate infrastructure or procedures to handle vast numbers of cases.

A foreign forum can be deemed inadequate if litigation delays are so egregious that they would effectively render a Plaintiff's remedy meaningless. *See Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227-29 (3d Cir. 1995). For example, in *Bhatnagar*, the Third Circuit concluded that evidence showing that the Indian judicial system was on the verge of collapse and that it could take up to twenty-five years to resolve the action warranted finding the Indian courts were an inadequate alternative forum. *Id.*

Because, however, litigation delay is so pervasive, minor delay cannot render an alternative forum inadequate. *Id.* Accordingly, delays of a few years are not dispositive in a forum non conveniens inquiry. *Id.*

Plaintiffs submit the declaration of Professor Garro who estimates that it could take between ten to fifteen years to try Plaintiffs' claims in their home countries. (October 17, 1996 Declaration of Professor Alejandro M. Garro at Exhibit 2(B) to Plaintiff. Response to Def. Motion to Dismiss, ¶ 43.) Professor Garro bases his opinion on the declarations of legal counsel who indicate that the complexity of the claims and magnitude of the action could result in a delay of the actions.

None of the legal counsel cited by Professor Garro, however, explicitly state that it would take ten to fifteen years to hear Plaintiffs' claims.

If Plaintiffs' claims were tried in the United States, the complexity and magnitude of the action would also prevent the case from being tried expeditiously. *See Delgado*, 890 F. Supp. at 1368. The nature of the case is such that trial of Plaintiffs' claims would face delay in any forum. In light of this, the Court finds that the prospect of delay in Plaintiffs' home countries does not warrant deeming the courts of Plaintiffs' home countries inadequate.

Plaintiffs also allege that the foreign courts are inadequate because the Plaintiffs face trial without a jury in them. The Ninth Circuit rejected this argument in *Lockman*; the court held that the lack of jury trials in Japan does not render Japanese courts an inadequate forum. *Lockman*, 930 F.2d at 768. Accordingly, the lack of jury trials does not render the courts in Plaintiffs' home countries inadequate.

Based on the foregoing, the Court concludes that the first prong of the forum non conveniens analysis is met. Because dismissal will be conditioned upon 1) Defendants' waiver of all jurisdictional and limitations defenses; 2) acceptance of jurisdiction over these actions by the courts in each of the foreign countries; and 3) agreement by the Defendants to satisfy any final judgment rendered in favor of Plaintiffs by a foreign court, the Court concludes that Defendants' burden to establish the existence of an alternative forum in each of Plaintiffs' countries has been met.

2. *Balance of Private and Public Interests*

Given the existence of an adequate alternative forum, the Court must balance private and public interests to see if the convenience of the parties would be served by dismissing the action so that the case can be heard in an alternative forum.

Creative Technology, Ltd., 61 F.3d at 699; *Contact Lumber*, 918 F.2d at 1449.

a. *Private Interest Factors*

Private interest factors include 1) the relative ease of access to sources of proof; 2) the availability of compulsory process for attendance of hostile witnesses; 3) the cost of obtaining the attendance of willing witnesses; 4) the possibility of on-site inspection if appropriate to the action; and 5) other problems that interfere with an expeditious trial. *Contact Lumber*, 918 F.2d at 1451.

i. *Ease of Access to Sources of Proof*

Plaintiffs allege that their injuries were caused in part by the defective marketing of DBCP through which Defendants manufactured, sold, distributed and used DBCP after they knew that DBCP could cause the injuries Plaintiffs suffered. Issues relating to these claims include 1) whether Plaintiffs were exposed to a particular defendant's product, 2) whether Plaintiffs were actually injured; 3) whether Defendants violated a duty by failing to provide adequate warnings or by marketing an unreasonably dangerous product; and 4) whether Defendants have a defense to their liability in Plaintiffs' own conduct. *Delgado*, 890 F. Supp. at 1366.

Defendants submit the affidavit of Burt Ballanfant, Senior Litigation attorney for Defendant Shell Oil Company. Mr. Ballanfant indicates that the greatest concentration of evidence relating to these issues of injury, diagnosis, cause, and fault are where the alleged exposure and injury took place. (12/19/97 Ballanfant Aff., at ¶¶ 5-17.) Mr. Ballanfant points out that Defendants will need to develop evidence relating to each plaintiff's exposure to DBCP from witnesses such as the plaintiffs, their co-workers, supervisors, and employers. These witnesses are almost exclusively located in Plaintiffs' home countries. (12/19/97 Ballanfant Aff., at ¶ 6.) Assuming exposure to DBCP, Defendants would also need to collect

evidence relating to each plaintiff's personal and medical history such as the testimony of doctors, pathologists, the plaintiff's friends, and acquaintances, almost all of whom would be located in Plaintiffs' home countries. (12/19/97) Ballanfant Aff., at ¶¶ 10-12.) Such evidence would not be within the subpoena power of the federal court. (12/19/97) Ballanfant Aff., at ¶ 16.)

Plaintiffs point out that their claims of injury caused by products invented, tested, formulated, manufactured, labeled, regulated and sold in the United States will be decided upon evidence located in the United States. (March 17, 1998 Affidavit of Christian H. Hartley attached at Exh. 1 to Plaintiff. Response to Def. Motion to Dismiss ("3/17/98 Hartley Aff."), at ¶ 6.) Mr. Hartley indicates that documents relating to the invention, testing, marketing, and usage of DBCP which are important for proving liability issues would be found in the United States. (3/17/98 Hartley Aff., at ¶ 7-12.) Plaintiffs further allege that each plaintiff can only testify in the United States (3/17/98 Hartley Aff., at ¶ 9), and that corporate documents located in the United States would not be permitted as evidence in Plaintiffs' countries (3/17/98 Hartley Aff., at ¶ 12.) Evidence before the Court, however, indicates that documents obtained in the United States could be used in the courts of Plaintiffs' home countries. (Sworn Statement of Dr. Gilberto Boutin attached as Exh. 15 to Plaintiff. Response to Def. Motion to Dismiss, at ¶ 21 (documents generated in the United States can be used in Panama if duly authenticated in the United States for use in Panama); Affidavit of Mario Fuetes at Guatemala II, Exh. B to 3/25/98 Morag Decl., ¶ 9; Ponce y Carbo Decl. at Ecuador II, Exh. A ¶ 9; Vincenzi Aff. at Costa Rica II, Exh. D ¶ 13.)

The Court can dismiss the action subject to the condition that Defendants agree to provide evidence and records relevant to Plaintiffs' claims. *See Piper Aircraft*, 454 U.S. at 257 n. 25. The Court finds that fewer evidentiary problems would be

posed if the action proceeded in Plaintiffs' home countries. To ensure that Plaintiffs have access to evidence located within the United States, the action will not be dismissed until 90 days after this Order is filed. During that time, Plaintiffs may pursue expedited discovery against Defendants under the supervision of this Court. Dismissal will also be conditioned on the stipulation by Defendants that all discovery conducted during the pendency of this action may be used in any foreign proceeding.

ii *Availability of Compulsory Process for Attendance of Unwilling Witnesses and Costs of Obtaining Attendance of Willing Witnesses*

Defendants' evidence indicates that a majority of fact witnesses reside in Plaintiffs' home countries. (12/19/97 Ballanfant Aff., at ¶¶ 6-8, 16.) Most of these witnesses would not be subject to the subpoena power of this Court. (12/19/97 Ballanfant Aff., at ¶¶ 8, 16.) Moreover, because many of the documents and most of the witnesses testimony would be in the languages of Plaintiffs' home countries, interpreters would be indispensable. (12/19/97 Ballanfant Aff., at ¶ 10.) Transportation costs to bring witnesses to Hawaii would be very high.

Defendants indicate that they may need to join as third-party defendants persons such as Plaintiffs' employers and supervisors and the owners and operators of independent farms on which Plaintiffs may have worked. (12/19/97 Ballanfant Aff., at ¶ 8.) These people would not be subject to the compulsory process of this Court. (12/19/97 Ballanfant Aff., at ¶ 8.) These private factors all weigh in favor of dismissing the action.

Based on the foregoing, the Court finds that the private interests of the parties weigh in favor of dismissing the action.

b. *Public interest factors*

Public interest factors include: 1) administrative difficulties flowing from court congestion; 2) imposition of jury duty on the people of a community that has no relation to the litigation; 3) local interest in having localized controversies decided at home; 4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; and 5) the avoidance of unnecessary problems in conflicts of law. *Creative Technology*, 61 F.3d at 703-04.

i. *Likelihood that Court Will Need to Apply Foreign Law*

The need to apply foreign law weights in favor of dismissal, although the factor alone is not sufficient to warrant dismissal when a balancing of all relevant factors show that the plaintiff's chosen forum is appropriate. *Piper Aircraft*, 454 U.S. at 260 n.29. Evaluation of this factor requires looking at the likelihood that the Court will have to apply foreign law to resolve the issues set forth in the instant action.

The choice of law inquiry has two aspects. First, the Court must determine if it should apply state or federal choice of law rules. *Schoenberg v. Exportadora de SAL, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). Second, applying the appropriate choice of law rules, the Court determines whose law applies in resolving the issues before the Court. *Id.*

In the instant action, the Court must apply federal choice of law rules because the Court's jurisdiction over the action is based on federal questions.[9] *Id.*

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[9] Even if the Court found jurisdiction based on diversity and applied Hawaii choice of law rules, the outcome would be the same. Application of either federal or Hawaii common law choice of law rules in the instant, action lead to the same conclusion that the law of Plaintiffs' home countries would apply. Under deciding which state has the strongest interest in seeing its law applies to a particular case. *Lemen v. Allstate*

Federal common law follows the Restatement (Second) of Conflict of Laws approach. *Id.* Under the Second Restatements, there is "a presumption that the law of the place where the injury occurred applies." *Id.* at 783 (citations omitted).

In the instant case, the injuries occurred in Plaintiffs' home countries. (Amended Complaint, at ¶ 4.) Under the Second Restatement approach, the laws of Plaintiffs' home countries should apply unless some other state has more significant relationship to the occurrence and the parties. Id.

The Second Restatement sets forth the following factors to consider in the "more significant relationship" test:

a) the needs of the interstate and international systems;

b) the relevant policies of the forum;

c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

d) the protection of justified expectations;

e) the basic policies underlying the particular field of law;

f) certainty, predictability and uniformity of result;

g) ease in the determination and application of the law to be applied.

Id.

Ins. Co., 938 F. Supp. 640, 643 (D. Haw. 1995). There is a presumption that Hawaii law applies unless another state's law would best serve the interests of the states and persons involved. *Id.*

In the instant action, it appears that Plaintiffs' home countries have the most significant interest in resolving claims by the residents for injuries occurring from exposure to DBCP while employed within their respective countries.

Applying these factors, the Court concludes that the home countries of the Plaintiffs have the most significant relationship to the occurrence and parties in this action. The home countries of the Plaintiffs would have a greater interest in determining whether Plaintiffs are entitled to recovery for their injuries. As stated above, each of Plaintiffs' home countries provides causes of action under which Plaintiffs could seek redress.

If the Court retained the lawsuit, the Court would be forced "to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language." *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985). Plaintiffs' home countries would be better able to apply their own law. *See Cabalceta*, 667 F. Supp. at 839. This public interest factor weighs in favor of dismissing the case.

ii. *Local Interest*

Plaintiffs point out that Hawaii has an interest in the instant action. Defendants Dole Food Company, Inc., Pineapple Growers Association of Hawaii, and Del Monte Fresh Produce Hawaii, Inc., which have their principal places of business in Hawaii. (Amended Complaint, at ¶ 26.) Plaintiffs allege that large amounts of DBCP containing materials were manufactured, formulated, and sold from Hawaii and that Hawaii accordingly has an interest in ensuring that parties are compensated for injuries caused by tortious activity which took place in Hawaii. (Plaintiff. Response to Def. Motion to Dismiss, at 22.)

The United States Supreme Court has indicated that the interest in deterring the production of defective products in the United States can be outweighed by other factors that a court should consider in engaging in a forum non conveniens inquiry. *See Piper Aircraft*, 454 U.S. at 260-61. In *Piper Aircraft*, the Court stated:

> Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if [defendants] were tried in the United States . . . However, the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

Id. This action involves injuries to foreign plaintiffs which occurred on foreign soil. Hawaii's and the United States' interests in the instant action are insignificant in comparison with the interests in the instant action are insignificant in comparison with the interests of the Plaintiffs' countries in the outcome of the litigation and in comparison with the burden that would be imposed on the court system, as discussed below. Accordingly, the Court finds that the local interest factor weighs in favor of dismissal.

iii. *Burden on the Court System and Imposition of the Jury*

As Defendants point out, Plaintiffs' choice of a United States forum places an extremely heavy burden on this Court. The claims present complex questions of agricultural practices, toxicology, and medical causation. Because of the large number of plaintiffs, it could take years to try the case. *See Delgado*, 890 F. Supp. at 1368. Enormous judicial resources would undoubtedly be consumed.

While a jury may have some interest in the litigation due to the presence of the Hawaii corporations, the bulk of the dispute appears to have little connection with Hawaii. None of the injured parties are from Hawaii; none of the injuries occurred here. The burden that a complex, lengthy trial would place on local jurors who would have to interpret the law of four

different foreign countries does not appear to be justified. *See Creative Technology, Ltd.*, 61 F.3d at 703-04. The burden that the instant action would place on this community weighs in favor of dismissal.

Based on the foregoing, the Court finds that dismissal of the instant action under forum non conveniens grounds is warranted. Defendants' burden showing an adequate alternative forum has been met. Additionally, the balance of relevant private and public interest factors favor dismissal.[10]

C. *Request for Injunction*

Defendants request that the Court enter an injunction preventing future state and federal lawsuits in this matter. As mentioned above, Judge Lake of the United States District Court for the Southern District of Texas permanently enjoined the plaintiffs and persons acting in concert with the plaintiffs, such as attorneys who appeared in the cases before him, from commencing or causing to be commenced in any court in the United States any action involving DBCP-related claims. (Certain Defendants' Motion to Dismiss and for Injunctive Relief, Exh. 6.) In light of the existence of Judge Lakes' injunction, the Court does not believe it is necessary to issue another injunction here. The Court DENIES Defendants' motion for injunctive relief without prejudice. Should a situation arise that makes it appropriate to consider an injunction, the Court will allow Defendants to raise the issue anew.

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[10] In light of the Court's conclusion that the action should be dismissed on forum non conveniens grounds, it is not necessary for the Court to reach Defendants' argument that the action should be dismissed under principles of international comity.

I. CONCLUSION AND ORDER

A. *Plaintiffs' Motion For Remand and In Opposition to Foreign Sovereignty Immunities Act Jurisdiction*

The Court finds that neither Dead Sea nor BCL qualify as an agency or instrumentality of a foreign state under the FSIA. Removal of the action by the Dead Sea Defendants was therefore not proper. Plaintiffs' motion to remand the action to state court, however, is DENIED on the basis that removal was proper under Defendants' Supplemental Grounds for Removal.

B. *Plaintiffs' Motion for Remand and In Opposition to the Supplemental Grounds for Removal*

The Court finds that this action raises issues of federal common law by implicating important foreign relations concerns. Accordingly, the Court concludes that it has federal question jurisdiction over the instant action and that removal of the action was proper. Plaintiffs' Motion for Remand and In Opposition to the Supplemental Grounds for Removal is therefore DENIED.

C. *Certain Defendants' Motion to Dismiss and for Injunctive Relief*

1. *Plaintiffs' Motion to Strike*

Plaintiffs' Motion to Strike is DENIED.

2. *Certain Defendants' Motion to Dismiss on Forum Non Conveniens Grounds*

Defendants' motion to dismiss on forum non conveniens grounds is conditionally GRANTED. This action will be dismissed 90 days after the filing date of this Order provided that:

a. Defendants have either waived or accepted service of process and waived any other jurisdictional defense

within 40 days after this Order is filed in any action commenced by a plaintiff in these actions in his home country or in the country in which his injury occurred. Any plaintiff desiring to bring such an action will do so within 30 days after the filing of this Order;

b. Defendants have waived within 40 days after the filing of this Order any limitations-based defense that has matured since the commencement of this action,

c. Defendants have submitted within 40 days after the filing of this Order an agreement binding them to satisfy any final judgement rendered in favor of Plaintiffs in a foreign court;

d. Defendants have complied with expedited discovery in the United States under the supervision of this Court within 90 days after this Order is filed;

e. Defendants have stipulated within 40 days after the filing of this Order that any discovery conducted during the pendency of this action may be used in any foreign proceeding to the same extent as if it had been conducted in proceedings there.

Any objections of Plaintiffs concerning the waivers, agreements, and stipulations pursuant to subparagraphs a., b. c., or e. above are to be filed within 50 days after the filing of this Order. Any reply to such objections will be filed within 60 days after the filing of this Order.

Furthermore, in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in this action in his home country or the country in which he was injured, that plaintiff may return to this Court and, upon proper motion, the Court will resume jurisdiction over the action as if the action had not been dismissed on forum non conveiens grounds.

3. *Certain Defendants' Motion for Injunctive Relief*

Defendants' motion for injunctive relief is DENIED.

D. *Pending Motions*

In addition to Plaintiffs' motions for remand and to strike and Defendants' motion to dismiss, a number of other motions are pending in this action. If this action is in fact dismissed in 90 days, all pending motions in this action not otherwise expressly addressed in this order will automatically be DENIED as MOOT.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September ____, 1998.

/s/
HELEN GILLMOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; and CARLOS HUMBERTO RIVERA; individually and on behalf of others similarly situated,

Plaintiffs,

vs.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; DOLE FRESH FRUIT INTERNATIONAL, INC.; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; STANDARD FRUIT COMPANY de COSTA RICA, S.A.; STANDARD FRUIT COMPANY DE HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC. (individually and as successor in interest to United Brands Company, Inc.); MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE COMPANY; JOHN DOES 1-10; JANE

DOES 1-10; DOE PARTNERSHIPS 1-10; and DOE CORPORATIONS 1-10,

Defendants.

DOLE FOOD COMPANY, INC.,

Defendant/Third-Party Plaintiff,

vs.

DEAD SEA BROMINE CO., LTD., and BROMINE COMPOUNDS LIMITED,

Third-Party Defendants.

Civil No. 97-01516 HG

ORDER DENYING THIRD PARTY DEFENDANTS DEAD SEA BROMINE CO., LTD. AND BROMINE COMPOUNDS LIMITED'S MOTION FOR RECONSIDERATION OF THE COURT'S FSIA RULING FILED HEREIN ON SEPTEMBER 9, 1998

I. INTRODUCTION

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. The Court granted a conditional dismissal on forum non conveniens grounds by written Order entered September 9, 1998. In the Order, the Court ruled that the Third-Party Defendants Dead Sea Bromine Co., Ltd. And Bromine Compounds Ltd. (Dead Sea Defendants) were not organs of the state of Israel within the meaning of the Foreign Sovereign Immunities Act (FSIA). The matter is now before the Court on the Dead Sea Defendants' Motion for Reconsideration of the Court's FSIA

Ruling Filed herein on September 9, 1998 (Dead Sea Defendants' Motion).

Dead Sea Defendants' Motion requests that the Court reconsider the determination that the Dead Sea Defendants are not organs of the State of Israel under the FSIA. For the reasons set forth below, the Court denies the Dead Sea Defendants' Motion.

II. BACKGROUND

On September 9, 1998, the court entered an Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed December 24, 1997 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits. Dead Sea Defendants' Motion was filed herein on September 21, 1998. Defendant Dow Chemical Company filed a Joinder to Dead Sea Defendants' Motion on September 25, 1998. Plaintiffs filed a Memorandum in Opposition to Dead Sea Defendants' Motion on October 2, 1998. Five Defendants filed statements of no opposition: Occidental Chemical Corp. (October 1, 1998); Chiquita Brands, Inc., Chiquita Brands International, Inc. and Maritrop Trading Corp. (October 1, 1998); and Shell Oil Co. (October 8, 1998). On October 14, 1998, Dead Sea Defendants filed a Reply Memorandum of Law.

III. DISCUSSION

The disposition of a motion for reconsideration is committed to the sound discretion of the district court. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1991). In entertaining such a motion, courts should not lightly disregard the "compelling interest in the finality of judgments[.]" *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).

It is well settled in the Ninth Circuit that a party seeking reconsideration and reversal of a prior decision of the Court must satisfy two burdens:

> First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision . . . . Courts have established only three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice.

Stein v. State Farm Mut. Auto. Ins. Co., 934 F. Supp. 1171, 1173 (D. Haw. 1996) (citing *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987), *rev'd on other grounds*, 863 F.2d 617 (9th Cir. 1988)). Local Rule 60.1 reflects this standard governing motions for reconsideration.

Here, Dead Sea has not alleged any facts or additional information that would allow the Court to change its decision. No intervening change in the law is argued and no new evidence has been produced. Dead Sea does argue a manifest error of fact in the September 9, 1998 Order is causing a manifest injustice.

Dead Sea Defendants argue that it is a manifest error of fact to find that the Dead Sea companies are not created by the government of Israel for a government mission or purpose. The term purpose was used in light of *Gates v. Victor Fine Foods*, 54 F.3d 1467 (9th Cir. 1995) and *Corporation Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996).

This Court held in the September 9, 1998 Order that the Dead Sea Defendants are not "organs" within the meaning of the FSIA. The statements of Noah Erhlich were considered by

this Court. They express the conclusions of the Dead Sea Defendants and do not require this Court to reach a conclusion different than that expressed at length in the September 9, 1998 Order. The totality of the evidence continues to convince the Court that the Dead Sea Defendants are not "organs" within the meaning of the FSIA. The Court DENIES Dead Sea Defendants' Motion.

IV. CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED that Dead Sea Defendants' Motion Filed September 21, 1998 is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 17, 1998.

HELEN GILLMOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERARDO DENNIS PATRICKSON, et al.,
Plaintiffs,

vs.

DOLE FOOD COMPANY, INC., et al.,
Defendants.

DOLE FOOD COMPANY, INC.,
Defendant/Third-Party Plaintiff,

vs.

DEAD SEA BROMINE CO., LTD. and
BROMINE COMPOUNDS LIMITED,
Third-Party Defendants.

Civil No. 97-01516 HG

ORDER DISMISSING ACTION
and
ACCEPTING IN PART AND REJECTING IN PART DEL MONTE DEFENDANTS'
AGREEMENTS REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING IN PART AND REJECTING IN PART THE DOLE DEFENDANTS'
AGREEMENTS REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING AMVAC CHEMICAL CORPORATION'S NOTICE OF AGREEMENTS

SATISFYING FORUM NON CONVENIENS CONDITIONS
and
ACCEPTING DEFENDANT THE DOW CHEMICAL COMPANY'S AGREEMENTS
REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING OCCIDENTAL CHEMICAL CORPORATION'S AGREEMENTS
REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING DEFENDANT PINEAPPLE GROWERS ASSOCIATION OF HAWAII'S AGREEMENTS
REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING SHELL OIL COMPANY'S NOTICE OF AGREEMENTS SATISFYING FORUM NON CONVENIENS CONDITIONS
and
ACCEPTING DEFENDANTS CHIQUITA BRANDS, INC., CHIQUITA BRANDS INTERNATIONAL, INC. AND MARITROP TRADING CORPORATION'S
RESPONSE TO THIS COURT'S SEPTEMBER 9, 1998 AND OCTOBER 19, 1998 ORDERS ESTABLISHING CONDITIONS FOR DISMISSAL FORUM NON CONVENIENS
and
DENYING IN PART AND SUSTAINING IN PART PLAINTIFFS' AMENDED
OBJECTIONS TO DEFENDANTS' STIPULATIONS AND AGREEMENTS

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. The Court granted a conditional dismissal on forum non conveniens grounds on September 9, 1998. On October 19, 1998, the court amended deadlines contained in the September 9, 1998 Order.

The Court, in granting Defendants' motion for dismissal, required the Defendants to agree to conditions in order to achieve dismissal on forum non conveniens grounds. Defendants submitted their stipulations, waivers, and agreements (collectively, "agreements") in a timely fashion. Plaintiffs filed objections to which certain Defendants replied. Plaintiffs then amended their objections to which certain Defendants also replied. After considering the papers, the Court FINDS that the Defendants have complied with the requirements of the Court's September 9, 1998 and October 19, 1998 Orders and the action is DISMISSED.

One objection raised by Plaintiffs regarding the agreements of the Del Monte Defendants[1] and the Dole Defendants[2] is SUSTAINED. The two Defendants have attempted to limit their agreements to countries in which they believe they might be subject to liability due to their banana growing operations.

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[1] Defendants Del Monte Fresh Produce Company, Del Monte Fresh Produce N.A., Inc., Fresh Del Monte N.V., and Del Monte Fresh Produce Hawaii, Inc.

[2] Defendants Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Ltd., Dole Fresh Fruit International, Inc., Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., and Standard Fruit de Honduras, S.A.

As the issue is a factual matter not addressed by this Court, the Court STRIKES those portions of the Dole Defendants and Del Monte Defendants' agreements which purport to limit the agreement to the countries in which they allege to have had banana growing operations. The agreements are limited to actions filed in a plaintiff's home country or in a country where plaintiff suffered an injury. (Order, Oct. 19, 1998 at 8.)

PROCEDURAL BACKGROUND

The court entered an Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed December 24, 1997 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits on September 9, 1998. Based on the stipulation of the parties and Plaintiffs' Second Motion to Alter or Amend Judgment under Rule 59(e), the Court, by Written Order entered October 19, 1998, amended the September 9, 1998 Order and extended the deadlines for compliance with the September 9, 1998 Order. The Order as amended provides in relevant part:

> "This action will be dismissed 180 days after the filing date of this Order provided that:
>
> a. Defendants have either waived or accepted service of process and waived any other jurisdictional defense, within 100 days after this Order is filed, in any action commenced by a plaintiff in these actions in his home country or in the country in which his injury occurred. Any plaintiff desiring to bring such an action will do so within 90 days after the filing of this Order;
>
> b. Defendants have waived, within 100 days after the filing of this Order, any limitations-based defense that has matured since the commencement of this action;

c. Defendants have submitted, within 100 days after the filing of this Order, an agreement binding them to satisfy any final judgment rendered in favor of Plaintiffs in a foreign court;

d. Defendants have complied with expedited discovery in the United States under the supervision of this Court within 90 days after this Order is filed;

e. Defendants have stipulated, within 100 days after the filing of this Order, that any discovery conducted during the pendency of this action may be used in any foreign proceeding to the same extent as if it had been conducted in proceedings there.

Any objections by Plaintiffs concerning the waivers, agreements, and stipulations pursuant to subparagraphs a., b., c., or e. above are to be filed within 110 days after the filing of this Order. Any reply to such objections will be filed within 120 days after the filing of this Order." (Order of Oct. 19, 1998 at 8-9.)

In order to comply, the Defendants filed the following agreements: (1) Del Monte Defendants' Agreements Regarding Conditions of Dismissal for Forum Non Conveniens (October 19, 1998); (2) The Dole Defendants' Agreements Regarding Conditions of Dismissal for Forum Non Conveniens (October 19, 1998); (3) Amvac Chemical Corporations' Notice of Agreements Satisfying Forum Non Conveniens (October 19, 1998); (4) Defendant The Dow Chemical Company's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens (October 19, 1998); (5) Defendant Occidental Chemical Corporation's Agreements Regarding Conditions of Dismissal for Forum Non Conveniens (October 19, 1998); (6) Defendant Pineapple Growers Association of Hawaii's Agreements Regarding Conditions of Dismissal for Forum Non Conveniens (October 19, 1998); (7) Shell Oil Company's Notice of Agreements Satisfying Forum Non Conveniens

Conditions (October 19, 1998); and (8) Defendants Chiquita Brands, Inc., Chiquita Brands International, Inc. and Maritrop Trading Corporation's[3] Response to This Court's September 9, 1998 and October 19, 1998 Orders Establishing Conditions for Dismissal Forum Non Conveniens (December 19, 1998). Plaintiffs filed objections to these agreements on December 28, 30, and 31, 1998.[4] Defendant The Dow Chemical Company replied to these objections on January 7, 1999[5] and filed an Errata to its Reply on January 15, 1999. On January 8, 1999, Plaintiffs amended their objections. Defendant The Dow Chemical Company filed a reply to the amended objections on January 28, 1999.[6]

DISCUSSION

Plaintiffs make essentially seven objections to the Defendants' agreements. First, the Plaintiffs object to the Defendants limiting their agreements to the named Plaintiffs. Second, Plaintiffs object to the requirement that service be effected in accordance with the law of the jurisdiction. Third, Plaintiffs object to language relating to discovery. Fourth, Plaintiffs object to limitations on the Defendants' agreements regarding the enforcement of foreign judgments. Fifth, Plaintiffs object to attempts to limit the jurisdictions in which

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[3] Chiquita Defendants.

[4] Plaintiffs apparently filed their objections three times. (*See* Docket No. 224, Docket No. 225, and Docket No. 227.)

[5] The Chiquita Defendants, the Dole Defendants, Amvac Chemical Corp. (With American Vanguard Corp. (sic)), Occidental Chemical Corp., and the Del Monte Defendants all filed statements of joinder in The Dow Chemical Company's reply to the Plaintiffs' objections.

[6] The Dole Defendants, the Chiquita Defendants, Occidental Chemical Corp., and Amvac Chemical Corp. all filed statements of joinder in The Dow Chemical Company's reply to the Plaintiffs' amended objections.

the Defendants will submit to litigation. Sixth, Plaintiffs object to reservations of the right to argue lack of personal jurisdiction should the case return to this Court. Seventh, Plaintiffs argue that the Defendants' agreements do not raise any issues regarding Plaintiffs' compliance with the Orders of September 9 and October 19, 1998. Plaintiffs worry that the Defendants may attempt to raise arguments of non-compliance by the Plaintiffs should the matter ever return to this Court. This Order analyzes each objection presented by the Plaintiffs, in turn.

1. Limitation to Named Plaintiffs

Plaintiffs complain that Defendants' agreements are limited to the named Plaintiffs and do not include putative class members. This Court never reached the question of whether a class was appropriate in this case and the Court never certified a class. The Court's September 9, 1998 Order directs Defendants to consider only actions filed by the named Plaintiffs. (*See, e.g.*, September 9, 1998 Order at 62, ¶ a. (". . . in any action commenced by a plaintiff.") The Court did not consider or give any indication that the agreements apply to any other party than the named Plaintiffs.

2. Service of Process

Plaintiffs argue that the Defendants should not force Plaintiffs to comply with the foreign rules regarding service of process in the foreign jurisdictions. Defendants have appointed agents in the foreign jurisdictions. Defendants have appointed agents in the foreign countries for service of process. The agents are authorized to accept service of process according to the laws of the country in which the suit is filed. The Defendants have waived the right to assert defenses based on lack of in personam jurisdiction.

The Court required the Defendants to accept or waive service of process within 100 days of the September 9, 1998 Order. All service should have been accepted or waived by the

Defendants by December 19, 1998. Plaintiffs, in their objections, fail to assert any specific instance where Defendants have failed to accept or waive service of process by the December 19, 1998 deadline. Insofar as the Defendants might assert objections in the foreign fora based on improper service, that matter is properly before the foreign court.

3. Discovery

The Plaintiffs argue that the Defendants should agree to the complete admissibility of material made available to them in expedited discovery before this Court. The Defendants here have all fashioned agreements which closely mirror the language of the Court's September 9, 1998 Order as amended. They have all agreed that any "discovery conducted during the pendency of this action may be used in any foreign proceeding to the same extent as if it had been conducted in proceedings initiated there." (*E.g.*, Del Monte Defs.' Agreements at 4.) Plaintiffs' contention that the material obtained here by discovery should be automatically admissible in the foreign jurisdiction violates the spirit of the Court's Orders. If the Court adopted Plaintiffs' position, such a rule could result in the material being able to be used to a greater extent there than it would be allowed to be used here, given that discovery pursuant to Rule 26 is allowable for any evidence which may reasonably lead to admissible evidence.

4. Enforcement of Final Judgments

Defendants agree to satisfy any final judgment rendered against them and in favor of Plaintiffs in a foreign lawsuit. They purport to retain the right to contest such a judgment if it was obtained by fraud, without due process of law, or without sufficient notice of the proceedings. The defendants further reserve the right to contest any judgment that results from a bill of attainder or ex post facto. (*See, e.g.*, Dole Defendants' Agreement at 5.) These issues seem to have been raised by Defendants as an attempt to reserve the usual

defenses to a foreign judgment under general principles of comity. *See generally In Re Union Carbide*, 809 F.2d 195, 205-6 (2d Cir. 1987).

General principles of comity allow defendants in any action to enforce a foreign judgment to raise the defenses of fraud, lack of due process, and lack of sufficient notice. *See id.* This Court does not seek to bind Defendants to a final judgment obtained by fraud, without due process of law, or lack of sufficient notice.

Although unlikely, if the Defendants were able to demonstrate that the judgment obtained by Plaintiffs was the result of a legislative act and not a judicial one, they could similarly raise the defenses of bill of attainder or ex post facto laws under principles of comity.

5. Limitations on Jurisdictions

Plaintiffs object to wording in two of the agreements where the Del Monte and the Dole Defendants have attempted impermissibility to limit their consent to jurisdiction to certain countries. These Defendants contend they need only submit to the jurisdiction of those countries in which they had banana operations at the time of DBCP use. The Defendants rely on discovery material obtained in similar cases litigated elsewhere for the factual proposition that they did not have banana operations in each of the countries where Plaintiffs allege they lived and/or were injured.

The Del Monte Defendants include in their agreement the following clause. "4. With respect to the assertion of claims against Del Monte, the lawsuit must have been brought in Costa Rica or Guatemala." (Del Monte Defs.' Agreement at 3.) The Dole Defendants include the following clauses: "6. As to Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company, the lawsuit must have been filed in Costa Rica or Ecuador. 7. As to Standard Fruit Company de Costa Rica,

S.A., Dole Fresh Fruit International, Inc., and Dole Fresh Fruit International, Ltd., the lawsuit must have been filed in Costa Rica. 8. As to Standard Fruit de Honduras, S.A., the lawsuit must have been filed in Honduras." (Dole Defs.' Agreement at 4.)

While it may be true that the above companies only have operations in the jurisdictions given, this Court has not had the issue properly presented to it. This Court has made no factual findings as to the extent of any Defendant's banana operations or DBCP usage. These matters are properly before the foreign courts. The Court, by holding the foreign jurisdictions to be adequate alternative fora, has already determined that these Courts are capable of determining the existence and extent of liability, if any. Accordingly, the Court SUSTAINS the fifth objection and STRIKES the above quoted material from the agreements of the Dole and Del Monte Defendants.

6. Personal Jurisdiction

The Plaintiffs argue that it is unfair that Defendants reserve the right to protest the personal jurisdiction of this Court should the case return to it. This is the third time this issue has been addressed by this Court. (*See* September 9, 1998 Order at 30 n.7; October 19, 1998 Order at 6-7.) For the reasons set out clearly in its previous orders, the Court has not yet ruled on the issue of personal jurisdiction. "The matter of personal jurisdiction will be heard only if the action should be returned to this Court." (October 19, 1998 Order at 7.)

7. Compliance with the Court's Orders

Plaintiffs argue that the Defendants intend to re-litigate compliance with the conditions set forth in the Court's September 9, 1998 Order as amended if Plaintiffs return to enforce a judgment obtained in a foreign jurisdiction. Plaintiffs cite no portion of the Defendants agreements which so reserve such a right. Defendants, in their Reply to the amended objections fail to raise the issue in response. The Court finds

that the Defendants have waived the right to raise issues of Plaintiffs' compliance with the September 9, 1998 and October 19, 1998 Orders, should this case return for enforcement of a final judgment in the future.

CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED THAT:

1. The Del Monte Defendants' Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED IN PART AND REJECTED IN PART. The Court STRIKES the following from the Agreements at Page 3: "4. With respect to the assertion of claims against Del Monte, the lawsuit must have been brought in Costa Rica or Guatemala."

2. The Dole Defendants' Agreements Regarding Conditions of Dismissal for Forum Non Conveniens are ACCEPTED IN PART AND REJECTED IN PART. The Court STRIKES the following from the Agreements at Page 4: "6. As to Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company, the lawsuit must have been filed in Costa Rica or Ecuador. 7. As to Standard Fruit Company de Costa Rica, S.A., Dole Fresh Fruit International, Inc., and Dole Fresh Fruit International, Ltd., the lawsuit must have been filed in Costa Rica. 8. As to Standard Fruit de Honduras, S.A., the lawsuit must have been filed in Honduras."

3. Amvac Chemical Corporation's Notice of Agreements Satisfying Forum Non Conveniens Conditions is ACCEPTED.

4. Defendant The Dow Chemical Company's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED.

5. Defendant Occidental Chemical Corporation's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED.

6. Defendant Pineapple Growers Association of Hawaii's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED.

7. Shell Oil Company's Notice of Agreements Satisfying Forum Non Conveniens Conditions is ACCEPTED.

8. Defendants Chiquita Brands, Inc., Chiquita Brands International, Inc. and Maritrop Trading Corporation's Response to this Court's September 9, 1988 and October 19, 1998 Orders Establishing Conditions for Dismissal Forum Non Conveniens is ACCEPTED.

9. Plaintiffs' Amended Objections to Defendants' Stipulations and Agreements are DENIED IN PART AND SUSTAINED IN PART.

10. Defendants have complied with the Court's conditions of dismissal imposed in the Court's Orders of September 9, 1998 and October 19, 1998. Accordingly, this action is DISMISSED. The Clerk is instructed to close the file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 8, 1999

/s/
HELEN GILLMOR
United States District Court
Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; and CARLOS HUMBERTO RIVERA; individually and on behalf of others similarly situated,

Plaintiffs,

v.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; DOLE FRESH FRUIT INTERNATIONAL, INC.; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION, individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company; STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; STANDARD FRUIT COMPANY de COSTA RICA, S.A.; STANDARD FRUIT COMPANY DE HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC. individually; UNITED BRANDS COMPANY, INC.; MARITROP TRADING CORPORATION; DEL MONTE

FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE HAWAII, INC.; DEL MONTE FRESH PRODUCE COMPANY AND FRESH DEL MONTE N.V.,

Defendants-Appellees,

v.

DEAD SEA BROMINE CO., LTD.; BROMINE COMPOUNDS LIMITED,

Third-party-defendants-Appellees.

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated, Plaintiffs-Appellees,

v.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION, individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company; STANDARD FRUIT CO.; STANDARD FRUIT & STEAMSHIP CO.; STANDARD FRUIT COMPANY DE COSTA RICA, S.A.; STANDARD FRUIT COMPANY DE HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS

INTERNATIONAL, INC., INDIVIDUALLY; UNITED BRANDS COMPANY, INC., SUC CHIQUITA BRANDS INTERNATIONAL, INC.; MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE HAWAII, INC.; DEL MONTE FRESH PRODUCE COMPANY AND FRESH DEL MONTE N.V.,

Defendants-Appellees,

and

DEAD SEA BROMINE CO., LTD.; BROMINE COMPOUNDS LIMITED,

Third-party-defendants-Appellants.
No. 99-16770
D.C. No. CV-97-01516-HG/BMK

ORDER

Before: KOZINSKI, GRABER and FISHER, Circuit Judges.

The petitions for rehearing are denied. The full court has been advised of the petitions for rehearing en banc and, no judge having requested a vote thereon, the petitions for rehearing en banc are also denied. Fed. R. App. P. 35.

[Filed July 10, 2001]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

GERARDO DENNIS PATRICKSON, et al.,
Plaintiffs,

vs.

DOLE FOOD COMPANY, INC., et al.,
Defendants.

DOLE FOOD COMPANY, INC.,
Defendant/Third-Party Plaintiff,

vs.

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,
Third-Party Defendants.

CIVIL NO. 97-01516

ORDER DENYING PLAINTIFFS' MOTION TO RECONSIDER UNDER RULE 59(e) FILED MARCH 22, 1999 AND PLAINTIFFS' SUPPLEMENTAL MOTION FILED APRIL 14, 1999

INTRODUCTION

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. The Court granted a conditional dismissal on forum non conveniens grounds. The matter is now before the Court on Plaintiffs'

Motion to Reconsider Under Rule 59(e) ("Rule 59(e) Motion") and Plaintiffs' Supplemental Motion to Reconsider Under Rule 59(e) ("Supplemental Motion").

Plaintiffs have filed these two motions requesting that the Court reconsider the determination of federal subject matter jurisdiction based on the common law of foreign relations. For the reasons set forth below, the Court DENIES Plaintiffs' Motions.

BACKGROUND

On September 9, 1998, the Court entered an order entitled Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed December 24, 1997 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits. On October 19, 1998, the Court entered an order granting Plaintiffs' Motion for Reconsideration, granting Defendants' Motion for Clarification, and amending deadlines contained in the September 9, 1998 Order. On March 22, 1999 Plaintiffs filed a Motion to Reconsider Under Rule 59(e). On April 14, 1999, Plaintiff filed a Supplemental Motion to Reconsider Under Rule 59(e). On April 26, 1999, Defendant Dow Chemical Company filed a Memorandum in Opposition to 1) Plaintiffs' Motion to Reconsider Under Rule 59(e), and 2) Plaintiffs' Supplemental Motion to Reconsider Under Rule 59(e).

Seventeen Defendants filed Joinders to Defendant Dow Chemical Corp.'s Memorandum in Opposition to Plaintiffs' Motions: Chiquita Brands Inc. and Chiquita Brands Intl. (April 26, 1999); Maritrop Trading Corp. (April 26, 1999); Third-Party Defendants Dead Sea Bromine Co. And Bromine Compounds Ltd. (April 26, 1999); Dole Food Company, Inc.,

Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit, Inc., Standard Fruit Co., Standard Fruit and Steamship Co., Standard Fruit Co. de Costa Rica, S.A., Standard Fruit de Honduras, S.A. (April 26, 1999); Del Monte Fresh Product N.A. and Del Monte Fresh Produce Co. (April 27, 1999); Occidental Chemical Corp. (April 28, 1999); and AMVAC Chemical Corp. (May 3, 1999). On May 7, 1999, Plaintiffs filed their Reply.

On April 23, 1999, Plaintiffs filed an Ex Parte Motion to Supplement the Record ("Ex Parte Motion"). On May 4, 1999, Defendant Dow Chemical filed an Opposition to Plaintiffs' Ex Parte Motion ("Opposition to Plaintiffs' Ex Parte Motion"). Defendants AMVAC Chemical Corp. (May 6, 1999); Occidental Chemical Corp. (May 7, 1999); Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit, Inc., Standard Fruit Co., Standard Fruit and Steamship Co., Standard Fruit Co. de Costa Rica, S.A., Standard Fruit de Honduras, S.A. (May 7, 1999); Chiquita Brands Inc. and Chiquita Brands Intl. (May 7, 1999); Maritrop Trading Corp. (May 7, 1999); Third-Party Defendants Dead Sea Bromine Co. And Bromine Compounds Ltd. (May 10, 1999) all filed Joinders to Dow Chemical Corp.'s Opposition to Plaintiffs' Ex Parte Motion. On May 14, 1999, Plaintiffs filed a Reply.

STANDARD OF REVIEW

A party seeking reconsideration of a decision of the Court under Rule 59(e) of the Federal Rules of Civil Procedure must satisfy two burdens:

> First, it must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.

All Hawaii Tours, Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd on other grounds*, 855

f.2d 860 (9th Cir. 1988). Motions under Rule 59(e) are granted upon three grounds: (1) if the district court is presented with newly discovered evidence; (2) if the district court committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah County v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A Motion to amend or alter under rule 59(e) ". . . may not be used to relitigate old matters or to raise arguments or present evidence that could have been raised prior to entry of judgment." *Demasse v. ITT Corp.*, 915 F. Supp. 1040, 1048 (D. Ariz. 1995).

DISCUSSION

Plaintiffs contend that: 1) they are precluded from bringing any of their claims in Panama, Ecuador, or Guatemala as those are not available alternative fora; 2) Shell Oil Company's Answer in Guatemala seeks to assert limitations defenses Defendants would not have in Hawaii; and 3) Defendants have failed to appoint agents in the foreign countries for service of process. For the reasons stated below, the Court: 1) DENIES Plaintiffs' Motion to Reconsider Under Rule 59(e) and Supplemental Motion to Reconsider Under Rule 59(e); and 2) GRANTS Plaintiffs' Ex Parte Motion to Supplement the Record.

A. Available Alternative Fora

1. Panama

Plaintiffs assert that the courts of Panama have clearly and repeatedly ruled that they do not have jurisdiction over DBCP cases dismissed from the United States on forum non conveniens grounds. In support of their argument, Plaintiffs provide a September 20, 1995 order of dismissal by the Second Circuit Civil Court of Panama, dismissing a plaintiff's action after a forum non conveniens dismissal from the United States District Court for the Southern District of Texas. Because this

1995 Order was available to Plaintiffs prior to the issuance of this Court's final judgment and is neither new evidence nor an intervening change in the law of Panama, this argument fails to provide a basis for reconsideration. *See School Dist. No. 1J., Multnomah County*, 5 F.3d at 1263; *Demasse*, 915 F. Supp. at 1048.

Plaintiffs also provide a declaration from Plaintiffs' local counsel in Panama, Rufina Lambrano. This declaration recounts a December 18, 1998 ruling in the case of *Valentin Valdez v. Dole Food Company, et al.*, Civil Action No. 1:96cv362GR, in the Third Circuit Civil Court of Panama, which dismissed an action on the grounds that it lacked jurisdiction. (Plaintiffs' Rule 59(e) at Exh. A). Based upon the evidence submitted, the Court is unable to determine the grounds upon which the Panama case was dismissed. It is similarly unclear based upon the *Valentin Valdez* dismissal, whether Plaintiffs' claims in the instant case would be dismissed upon the same or similar grounds. In the absence of dispositive evidence of the fundamental issue, the Court denies Plaintiffs' motion to reconsider this issue.

2. Ecuador

Plaintiffs argue in their Motion to Reconsider that the Court cannot dismiss the cases of Plaintiffs from Ecuador because Ecuador's "Law 55" deprives an Ecuador trial court of jurisdiction and the "highest court in Ecuador has, in effect, affirmed an Ecuadoran court of appeals decision finding that [Law 55] is valid and constitutional." (Plaintiffs' Rule 59(e) Motion at 4). In support of their Motion, Plaintiffs submit a letter from Circuit Judge Celeste Hardee Muir of the Circuit Court of the Eleventh Judicial Circuit of Florida. (Plaintiffs' Supplemental Motion at Exh. 1). Judge Muir's letter states that "plaintiffs" choice of forum should be sustained . . .[as] *[t]he alternate forum is no longer appropriate in light of the legislative* and economic situation in Ecuador and surrounding Ecuador." *Id.* (emphasis in original). Plaintiffs also submit, in

their Ex Parte Motion to Supplement the Record, Circuit Judge Muir's opinion in *Ferrin, et al. V. Million Air, Inc., et al.*, and a recent decision by an Ecuadoran court which considers the same Ecuadoran law at issue.[7]

In contrast, Defendants submit an affidavit of Dr. Jose Meythaler Baquero, an attorney licensed to practice in Ecuador, who states that this Ecuadoran decision is not a change in the controlling law of Ecuador. The Baquero affidavit states that, in fact, the decision to which Plaintiffs refer was clarified in a January 28, 1999 order in which the First Chamber of the Supreme Court of Ecuador made it clear that it was merely rejecting the appeal for lack of appellate jurisdiction and was not affirming the lower court rulings on the merits. (Def.s' Mem. In Opposition to Plaintiffs' Rule 59(e) Motion, Exh. I at ¶ 11). Defendants also submit additional authority, pursuant to Local rule 7.8, which expressly rejected an argument identical to Plaintiffs' argument that Ecuadoran Law removes Ecuador as an adequate alternative forum.

The Court is not persuaded, based upon the evidence submitted, that there is a basis to reverse its prior decision. The evidence provided by Plaintiffs is in direct conflict with the evidence submitted by Defendants. None of Plaintiffs' evidence sufficiently demonstrates an intervening change in the law of the Ecuadoran courts. In the absence of dispositive evidence of the fundamental issue, the Court denies Plaintiffs' motion to reconsider this issue.

3. Guatemala

Plaintiffs assert that the Court should reconsider its prior decision as the Guatemalan courts are not competent to try this

[7] The Court grants Plaintiffs' Ex Parte Motion to Supplement the Record. The Court has reviewed and considered the supplemental evidence provided by Plaintiffs.

case. In support of their argument, Plaintiffs cite cases and legal articles from 1995 and 1997.

The Court finds that Plaintiffs have not alleged any facts or additional information that would allow the Court to reconsider its decision. No intervening change in the law is argued and no new evidence has been produced. Plaintiffs merely restate arguments heard by the Court prior to its September 9, 1998 Order and argue law that was in effect at the time the order was issued. The Court declines to reconsider the same points that were briefed by the parties and considered by the Court. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1988) (party moving for reconsideration cannot merely reargue facts and legal arguments that were previously submitted to the court). Further, the Court finds that Plaintiffs' Motion does not reveal any manifest injustice because of error in law or fact. Accordingly, the Court DENIES Plaintiffs' Motion to Reconsider this issue.

B. Shell Seeking Limitations Defenses

Plaintiffs claim that Defendant Shell Oil Company, in its answer in Guatemala, "seeks to assert limitations defenses Defendants would not have in Hawaii." (Plaintiffs' rule 59(e) Motion at 10). Defendant Shell Oil argues that they only waived "limitation-based defense[s] that matured between November 12, 1997, the date that this action was filed, and December 9, 1998," and "Shell's answer plainly demonstrates that it is urging that limitations ran *before* Plaintiffs ever filed the instant action in Hawaii." (Def.s' Mem. In Opposition at 9) (emphasis in original).

A review of Defendant Shell Oil Company's Answer reveals Defendant's argument to be accurate. (Pl.s' Rule 59(e) Motion, Exh. H at 3). In its Notice of Agreements Satisfying Forum Non Conveniens Conditions filed on October 19, 1998, Defendant Shell Oil agreed to "waive or not assert any

limitations-based defense that has matured since the commencement of this action . . . ."

To that extent Plaintiffs assert Defendant Shell Oil has asserted limitations-based defenses that have matured since the filing of this action, Plaintiff is mistaken. Defendant Shell Oil's Answer strictly addresses limitations that may have run prior to commencement of this action. (Plaintiffs' Rule 59(e) Motion, Exh. H at 3). Insofar as Defendant Shell Oil has asserted limitation defenses that have not been waived pursuant to Defendant's Notice of Agreements Satisfying Forum Non Conveniens Conditions filed on October 19, 1998, such as those which may have run prior to the filing of the instant action, the Court declines to address this issue, as it is a matter properly before the foreign court.

C. Agents for Service of Process

Plaintiffs contend that most of the Defendants have failed to designate their agents for service of process in the foreign countries. (Plaintiffs' Rule 59(e) Motion at 10). Defendants argue that they are only obligated to designate agents in countries in which Plaintiffs have timely filed actions pursuant to the Court's Orders. (Defendants' Mem. in Opposition at 10-11). This Court considered and rejected this argument in its March 8, 1999 Order. Plaintiffs fail to assert any specific instance where Defendants have failed to accept or waive service of process where Plaintiffs have filed a timely action. On that basis, the Court declines to reverse its prior decision.

CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion to Reconsider Under Rule 59(e) and Supplemental Motion to Reconsider Under Rule 59(e) are DENIED.

2. Plaintiffs' Ex Parte Motion to Supplement the Record is GRANTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 16, 1999

/s/
HELEN GILLMOR
United States District Court
Judge

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 85--DISTRICT COURTS; JURISDICTION

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C.A. § 1391

§ 1391. Venue generally

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought--

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1441

§ 1441. Actions removable generally

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where

such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)--

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages, except any action under section 1605(a)(7) or 1610(f); if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has

been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in Kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice

of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or

political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. § 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued

pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.--The President may waive any provision of paragraph (1) in the interest of national security.

1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver, or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.